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Ms. Miriam Hill
Axxon Corporation
101 West Robert E. Lee
New Orleans, Louisiana 70124

Re: Axxon Corporation v. David Newman,
Eastern District of New Orleans, No. 95-0796

Dear Mike and Miriam:

Enclosed is the transcript of Eckhard Kuesters' deposition on June 20, 1997. As you know, the deposition was not completed and will be re-noticed for a later date.

With kind regards, I am,

Sincerely,


Bryan Reuter

BCR/jeb
Enclosure

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OBLON, SPIVAK, McCLELLAND
MAIER & NEUSTADT, P.C.

274083/1

EXHIBIT

In The Matter Of:

*AXONN CORPORATION v.
DAVID NEWMAN & DAVID NEWMAN & ASSOC., P.C.*

ECKHARD KUESTERS

June 20, 1997

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*Original File 13821.PRT, 100 Pages
Min-U-Script® File ID: 1470655497*

Word Index included with this Min-U-Script®

Page 1
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
CONFIDENTIAL
AXONN CORPORATION,
Plaintiff,
vs.
DAVID NEWMAN AND
DAVID NEWMAN & ASSOCIATES,
P.C. AND ABC INSURANCE CO.,
Defendants.
PAGES 1 - 100
Deposition of ECKHARD KUESTERS, held at the offices of
Oblon, Spivak, McClelland, Maier & Neustadt, P.C.,
1755 Jefferson Davis Highway, Arlington, Virginia,
commencing at 9:02 a.m. Friday, June 20, 1997, before
KAREN YOUNG, Notary Public.

Page 2
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Page 3
CONTENTS
WITNESS: ECKHARD KUESTERS
EXAMINATION BY: PAGE
MR. WOLBRETTE 4
DEPOSITION EXHIBITS
ECKHARD KUESTERS
NUMBER DESCRIPTION IDENTIFY
1 Bills 33
2 Bill of 428/95 33
3 Declaration of Donald L. Schilling, Ph.D. 93

Page 4
[11] ECKHARD KUESTERS, [12] having been
first duly sworn by [13] Karen Young, a
Notary Public [14] within and for the
Commonwealth of [15] Virginia, was ex-
amined and testified as [16] follows:
[18] EXAMINATION CONDUCTED
[19] BY MR. WOLBRETTE:
[110] Q: Would you state your name
please?
[111] A: Eckhard Kuesters.
[112] Q: And where do you reside, Mr.
Kuesters?
[113] A: Florence Road in Woodbine,
Maryland, 3145 [114] Florence Road,
Woodbine, Maryland.
[115] Q: You are an attorney; is that cor-
rect?
[116] A: That's correct.
[117] Q: And you practice with the firm of
Oblon, [118] Spivak? Did I pronounce it
right?
[119] A: Oblon, Spivak, et al., PC.

[120] Q: In Arlington, Virginia?
[121] A: Correct.
[122] Q: And do you have a specialty?
[111] A: Patent law.
[112] Q: And could you —
[113] A: Intellectual property law.
[114] Q: Are you a member of the patent
law bar?
[115] A: Yes, I am.
[116] Q: Could you give us a very brief
background, [117] your education, law
school?
[118] MR. USDIN: Before we start, just to get
[119] the formalities out of the way, this
deposition will [120] be taken subject to
the provisions of the [121] confidentiality
order under the current documents. [122]
All documents being provided are being
provided [123] subject to the provision of
that confidentiality order [124] will be
considered confidential. We will need
those [125] produced in accordance with
that. Anything that's not [126] marked
needs to be marked, and if it was
inadvertently [127] not marked, it still
needs to be marked.
[128] MR. WOLBRETTE: No problem.
[129] MR. LIPMAN: As long as we've in-
terrupted [130] the flow of your ques-
tioning, let me just say that as [131] you
know, we discussed off the record, I'm
here [132] representing the witness him-
self and the law firm for
[11] which he's employed.
[12] BY MR. WOLBRETTE:
[13] Q: And Mr. Kuesters, I'd asked you just
to [14] give me a brief resume.
[15] A: Well, I graduated from Rutgers, the
state [16] university, New Brunswick, New
Jersey, Rutgers [17] College, in 1968, B.S. in
electrical engineering. I [18] thereafter
went to work for Westinghouse Electric
[19] Corporation, worked for Westing-
house for seven years [120] as a design
engineer, starting as an associate [121]
engineer and finishing as a senior en-
gineer.
[122] Four years into my time at Wes-
tinghouse, I [123] began law school at night
at the University of [124] Maryland School
of Law in Baltimore, Maryland and [125]
finished up law school in January of
1977 is the [126] graduation date. In August
of 1976, I left [127] Westinghouse and
joined the firm of Oblon, Spivak, [128]
Then it was called Oblon, Fisher et al.,
P.C.
[129] Q: And are you a partner or the
equivalent of [130] the structure of this
firm?
[131] A: Yes, I am a member of the firm. The title

as [122] partner — it's a title.
Page 7
[11] Q: I understand. And how long have
you been [12] either a partner or a member
of the firm?
[13] A: Since 1981.
[14] Q: You have the right to read and sign
the [15] deposition. Do you want to do
that?
[16] MR. LIPMAN: Yes, you do.
[17] THE WITNESS: Yes, I do.
[18] BY MR. WOLBRETTE:
[19] Q: Mr. Kuesters, it appears to me that
you [120] have not had much experience
in depositions before; is [121] that correct?
[122] A: That is very correct.
[123] Q: You're not — or are you involved
in [124] litigation?
[125] A: Seldom. If so, only in the support
[126] capacity.
[127] Q: Well, I know that you have an
excellent [128] attorney next to you who's
representing you, and I [129] know that the
fellows representing Axonn are ex-
cellent [130] attorneys, and I suspect some
of them may have [131] explained to you
how this works, but very briefly, [132] ask
you questions. If somebody feels that the

Page 8
[11] question is improper for some reason,
they will [12] object. If that happens, let
them get their objection [13] in before you
answer. You may be told then to answer
[14] or not to answer, as the case may be.
And if you're [15] told to answer, go ahead
and answer.
[16] If you don't understand anything I say —
[17] and that's quite possible because I am
not a patent [18] lawyer, not do I have any
kind of technical [19] background. Please
tell me if I say something [120] nonsensical,
which is quite possible, or get the terms
[121] confused, please let me know and I
may ask you to help [122] me get those
things right. The idea is we need to [123]
communicate. And if I don't understand
what you've [124] said, I'll ask you.
[125] A: Okay.
[126] Q: Were you served with a subpoena
in this [127] case?
[128] A: Yes, I was.
[129] Q: And do you have a return to make
on that [130] subpoena? Before we get to
that, we were informed [131] before we set
this thing up that you were not [132]
available after 12 p.m. or noon today, and
I've been

Page 9
[11] told since I got here that you may need
to leave at [12] 11; is that correct?
[13] A: That's correct.
[14] Q: Before you want to accom-

June 20, 1997

CONFIDENTIAL

DAVID NEWMAN & DAVID NEWMAN & ASSOC., P.C.

AXONN CORPORATION v.

modate you. As [5] another lawyer, I hope you understand we've got a [6] lawsuit here and we've got deadlines imposed by a [7] federal judge. As long as you are agreeable that [8] you'll make yourself available, say, sometime within [9] the next 30 days at your convenience, I don't have any [10] problem at calling a stop to this at 11:00.

[11] A: I'm agreeable.

[12] Q: If we need to go on, I don't know if we [13] will or not. We'll see.

[14] MR. USDIN: And I think we talked about and [15] that we agreed if we do need to continue with the [16] deposition, that it could be done by phone.

[17] MR. LIPMAN: Steve, we will try to do that. [18] The only problem I have with that is if we got a [19] lot of documents, sometimes it's been my experience, [20] it's very awkward. Believe me, I have no desire to [21] come up here. As much as I like Washington, it's [22] about the worst place outside of New Orleans in the

Page 10

[23] summer. So if it is able, we can [24] that, but it's [25] conceivable that we might have to — it might be just [26] easier to do it. So I think we'll leave that option [27] open, but I will make every effort if we have to come [28] back to do it by telephone. We don't want to [29] inconvenience you or the witness [30] MR. USDIN: We will reserve our right to [31] object to coming back.

[32] MR. WOLBRETT: Sure.

[33] MR. USDIN: And my understanding was that [34] — well, you knew in advance that it was going to be [35] finished by noon and we're not objecting to keeping it [36] open, but we want to do it by phone unless there's [37] some compelling reason not to.

[38] MR. WOLBRETT: I understand your position. [39] We're just reserving our rights to do otherwise.

[40] BY MR. WOLBRETT:

[41] Q: I'd asked you about the subpoena. Have you [42] produced some documents his morning in response to [43] that subpoena?

[44] A: Yes, I have.

[45] Q: May I see the documents?

Page 11

[46] MR. USDIN: This is the only copy, and 2 copies need to be made, and these need to be marked — [47] well, they're marked as confidential.

[48] BY MR. WOLBRETT:

[49] Q: Have any documents been reviewed from what's [50] been produced or objected from what's been produced?

[51] A: What do you mean? April of 1993.

[52] MR. LIPMAN: Why don't you take it one at a [53] time? I'm not sure the witness even knows what [54] "redacted" means.

[55] BY MR. WOLBRETT:

[56] Q: Okay. What I'm trying to find out is we [57] sent you a request, a fairly broad request for various [58] categories of things, and I'm just trying to find out [59] if there were things that were felt to be within those [60] categories but that for some reason, privilege or [61] otherwise, were not included in what was produced to [62] us.

[63] A: Well, generally I tried to produce [64] everything you requested. Where there was material [65] covered by a privilege, that was blacked out.

[66] Q: All right.

Page 12

[67] A: Does that answer your question?

[68] Q: So there will be items — we're going to [69] let other counsel make a statement, but there are some [70] items that are either in this production, pieces of [71] paper that are in this box that have been blacked out areas [72] on them. That's what I would call a redaction.

[73] A: Uh-huh.

[74] Q: Are there any documents, total whole [75] documents that have not been produced because the [76] entire document was felt to be privileged or for some [77] other reason not producible?

[78] A: No.

[79] MR. USDIN: Can I consult with him a minute [80] and make sure?

[81] MR. WOLBRETT: Sure. We're all just [82] interested in getting an accurate description of [83] these.

[84] THE WITNESS: Oh, my communications with [85] the client, Axonn, are not being provided.

[86] BY MR. WOLBRETT:

[87] Q: So any document that would in some way be a [88] communication between you and Axonn has not been

Page 13

[89] included in the production?

[90] A: Correct.

[91] Q: And that would be either Axonn to you or [92] you to Axonn?

[93] A: Correct.

[94] Q: What about if you had telephone [95] conversations with Axonn or Axonn's counsel and if you [96] made notes of that or a memorandum or something of [97] that nature based on —

[98] A: That would not be included.

[99] Q: And there are such things?

[100] A: Not to my recollection.

[101] Q: Let me see if I can be a little bit

more [102] precise on that.

[103] MR. LIPMAN: I was going to object that [104] there was no foundation, but you can take it any way [105] you want.

[106] BY MR. WOLBRETT:

[107] Q: You're absolutely correct, Counsel. I [108] noticed in — a production has previously been made of [109] your bills to me and I'm going to ask you about those, [110] but there were references in the bills to

Page 14

[111] conversations with Mr. Eckstein, Mr. Fant, [112] Mr. Sanderford, Mr. Newman and others. Is it your [113] practice to make notes or a memorandum or in some way [114] record in writing the substance of those [115] conversations?

[116] A: Not generally.

[117] Q: Do you know if you did at any time in any [118] of these conversations that you had involving this [119] case?

[120] A: I do not recall.

[121] Q: So sitting here now, it's your — is it your testimony that there probably are no such written [122] recordings of those telephone conversations that you [123] had with either your client or with Mr. Newman?

[124] A: That's correct.

[125] Q: So therefore, there wouldn't be anything to [126] withhold?

[127] A: That's correct.

[128] Q: And when I say "client," I'm speaking of [129] Axonn. That was your client, correct?

[130] A: That's correct.

[131] Q: And you spoke to a number of people who

Page 15

[132] have some capacity with respect to Axonn.

[133] A: That's correct.

[134] Q: As I said, it would include Sanderford and [135] Fant and Eckstein; is that correct?

[136] A: Yes.

[137] Q: And was there anybody else that you spoke [138] of with?

[139] A: I can't say with certainty. I can [140] speculate. The likelihood would be Kathy Dixon.

[141] Q: What was her position?

[142] A: I think she's basically Mr. Sanderford's [143] secretary.

[144] Q: Was Erin Pierce one that you ever spoke to?

[145] A: Not that I recall.

[146] Q: So there's no complete, in that [147] there may have been some conversations with us

117 Q: Okay. Have you had any communication with 118 counsel for Axonn in the suit that brings us here, 119 that is, the Stone, Pignman firm or their predecessor, 120 what it — Robert Crutcher?

121 MR. USDIN: There were two firms that 122 Mr. Crutcher was with.

Page 16

111 A: When?

121 Q: At any time.

131 A: Yes.

141 Q: And did you make any written records of 151 your discussions, with them?

161 A: No.

171 MR. LIPMAN: Mr. Küesters, I just ask you 181 to hesitate a moment before you answer the questions.

191 BY MR. WOLBRETTE:

1101 Q: Yeah, I should have told you that. 1111 Everybody does that because in ordinary conversation, 1121 that's how we behave, but it's difficult for the court 1131 reporter to take us down, although they're incredible, 1141 — their ability to — that, but it's better if we 1151 don't speak at the same time.

1161 A: I apologize.

1171 Q: Everybody does it and the lawyers do it 1181 too. I was asking you, did you make any written 1191 record of any conversations, whether telephone 1201 conversation or in-person conversations, that you may 1211 have had with Axonn's outside counsel in this 1221 litigation?

Page 17

111 A: No.

121 Q: Thank you. You also I think spoke with me 131 and Ms. Manning concerning the revival attempt.

141 A: I believe that's true.

151 Q: Did you make any written record of our 161 conversations?

171 A: Not that I recall.

181 Q: Did you include in this box that 191 Ms. Manning is now looking at your bills?

1101 A: Yes.

1111 Q: I'm sure we're going to take a break, and 1121 what I'm probably going to ask you to do at a break is 1131 to look at the bills that I've got that have been 1141 previously produced to me and compare them with what 1151 you've got there. I just want to make sure I have a 1161 complete set of everything. And can you tell me how 1171 you kept the bills in this case? In other words, did 1181 you try — were you segregating out the charges 1191 dealing with the revival effort, were you segregating 1201 that particular patent as opposed to other work that 1211 you were

doing, or was there just one general bill for 1221 Axonn?

Page 18

111 MR. LIPMAN: Objection, form and 121 foundation. Only answer to the extent you personally 131 have knowledge as opposed to what the firm may have 141 done.

151 Q: Would it help to look at these? I'm just 161 trying to find out —

171 A: Yes, it would help to look at the bills. 181 Let me tell you where I'm coming from. A claim is 191 being made for your fees in this case, so I just want 201 to make sure that the fees that we're talking about 211 are fees that are associated with w' at s' going on in 221 this case and not something else.

231 A: Sure.

241 Q: So I'm just trying to find out, look at 251 your bills, if you could tell us how the bookkeeping 261 structure was set up, if you know.

271 A: What exactly is the question?

281 Q: The question is was the billing in 291 connection with the abandoned patent — if I say that, 301 you'll know what I'm talking about?

311 A: Yes.

321 Q: As far as I know, there's only one

Page 19

111 abandoned patent. Do you know of any more than one? 121 Do you know of any other patent that was abandoned?

131 A: This is the only one that I worked on.

141 Q: Right. Were the bills for the one that you 151 worked on, the abandoned patent — were those bills in 161 the way that the bills were sent out, the bookkeeping 171 method — were those the fees that you charged for 181 your efforts segregated from any other work that you 191 may have been doing for Axonn?

201 A: At the time, I was doing no other work for 211 Axonn.

221 Q: Since the application was revived, have you 231 done other work for Axonn?

241 A: Yes.

251 Q: And are any of the bills that you have sent 261 Axonn for other work included within the bills that 271 you have provided us?

281 A: Yes.

291 Q: What other work have you done for Axonn 301 other than the revival for which you have provided us 311 bills?

321 MR. LIPMAN: Just a minute, Mr. Küesters.

111 Mr. Küesters, in answering that question, please 121 answer it in a general manner at this point in time, 131 and in answering it, please be careful not to reveal 141 the substance of any communications with your client 151 that would possibly be privileged or work product 161 information. But for right now, answer that question 171 generally to the extent you can.

181 A: Primarily prosecution, patent prosecution.

191 Q: And is this prosecution of the abandoned 201 patent that was later revived or is it prosecution of 211 other patents?

221 MR. LIPMAN: Objection, form, ambiguous.

231 MR. WOLBRETTE: Well, it's difficult not to 241 be ambiguous since, you advised him to answer 251 generally, and he did, and I'm trying to find out, we 261 have a stack of bills that's been produced, claims 271 have been made for his fees. There's been no 281 specification as to which fees are being claimed, and 291 I'm trying to find out which of these bills relate to 301 the revival effort.

311 MR. LIPMAN: Why don't you ask the 321 question?

Page 21

111 BY MR. WOLBRETTE: The case of the lawsuit and 121 which of them relate to other things, and I think 131 that's exactly the question that I asked him when you 141 advised him to answer generally. That's what I'm 151 trying to get to. Can you help me out with that, 161 Mr. Küesters?

171 MR. LIPMAN: Counsel, ask a pointed 181 question and Mr. Küesters will answer it.

191 MR. USDIN: What is the question?

201 MR. LIPMAN: The question was can you help 211 him out, and I guess the answer is he can help you 221 out.

231 BY MR. WOLBRETTE:

241 Q: Fine. Tell me which one of the bills in 251 front of you relate to the revival of the abandoned 261 patent and which of them relate to prosecution of that 271 patent or other patents.

281 A: All bills which are under our reference 291 number 6926-002-20 DIV involve the application which 301 was abandoned and which was revived. Up until the 311 revival — or after the revival, there was no 321 substantive prosecution. The case was allowed, and I

Page 22

111 believe that the only bill under that docket number 121 after revival, which would have been prosecution per 131 se, would have been for payment of the

June 20, 1997

CONFIDENTIAL

DAVID NEWMAN & DAVID NEWMAN & ASSOC., P.C.

AXONN CORPORATION v.

base issue fee [1] and what other fees were associated with that. All [5] other bills prior to that time would have been for the [6] revival effort.

[7] Q: And what are the bills for file number [8] 6926-004-20 CONT for?

[9] A: I'm sorry. Would you repeat the number?

[10] Q: 6926-004-20 CONT. What are those bills [11] for?

[12] MR. LIPMAN: You're referring to the stack [13] of documents that are not an exhibit in this case in [14] front of the witness? Is that what you mean?

[15] MR. WOLBRETT: I'm referring to the stack [16] of documents, as I've been referring to since we've [17] started this line of questioning, that were produced [18] to us today that you have your hand on that we've been [19] referring to.

[20] MR. LIPMAN: I was just trying to help you [21] out, Counsel, because Mr. Kuesters doesn't remember [22] all these numbers and there's one that I turned to

Page 23

[1] that has that number that might help the witness. [2] Just trying to help you out.

[3] A: 6926 refers to Axonn. 004 is item [4] number. 004 is a continuation of the 002 case, which [5] was filed in the patent office.

[6] Q: Is this a continuation in part?

[7] A: No.

[8] Q: Continuation?

[9] A: Continuation.

[10] Q: Is it the same pattern that was involved in [11] the abandoned patent?

[12] MR. LIPMAN: Objection, vague, and [13] ambiguous.

[14] BY MR. WOLBRETT:

[15] Q: Is it the same patent or is it a different [16] patent?

[17] MR. LIPMAN: Same objection.

[18] Q: Do you understand the question?

[19] A: Can we go off the record?

[20] MR. LIPMAN: No. If he cannot get the [21] question right, that's —

[22] Q: Does the continuation lead to a different

Page 24

[1] patent other than the one that was abandoned?

[2] A: Correct.

[3] Q: So this is work on something that would [4] lead to an additional patent with the patent office, [5] for instance?

[6] A: That's correct.

[7] Q: This is not part of the revival effort, is it?

[8] A: That's correct.

[9] MR. LIPMAN: Objection, vague and [10] ambiguous.

[11] MR. USDIN: Objection.

[12] MR. LIPMAN: If you understand the [13] question, answer it.

[14] A: It's not.

[15] Q: It's not. Okay. And is the work that's [16] contained on that bill or any of the bills with that [17] number — was that done after the abandoned patent was [18] revived?

[19] MR. USDIN: Which bills are you referring [20] to?

[21] MR. WOLBRETT: The 6926-002-20 CONT.

[22] MR. LIPMAN: There are multiple bills.

Page 25

[1] MR. WOLBRETT: Right. You can go ahead [2] and take a look at them.

[3] THE WITNESS: I don't recall the date that [4] the 002 case was revived.

[5] MR. WOLBRETT: February 1996 was the [6] decision.

[7] MR. LIPMAN: That doesn't necessarily mean [8] that's the date a matter of law that the case was [9] revived, but nonetheless, you can answer the question [10] if you can.

[11] A: We began preparation of the continuation [12] before the revival in anticipation and being [13] optimistic that it would be revived, [14] anyway.

[15] Q: If it had not been revived, would this work [16] have been for naught?

[17] MR. LIPMAN: Objection, speculative.

[18] A: He objected.

[19] Q: You can answer. Unless he feels [20] not to [21] answer, you can answer.

[22] A: Yes.

[23] Q: And there's a third file number.

Page 26

[1] 6926-007-20 CONT, that is referenced in this stack of [2] documents. Can you tell me what that refers [3] to?

[4] A: This is a further continuation, application [5] off of the 004 case.

[6] Q: And when did the work begin on this file?

[7] MR. LIPMAN: Objection, vague and [8] ambiguous. Mr. Kuesters, are you answering that [9] question based upon the documents or based upon your [10] memory?

[11] A: I don't recall exactly when the work began.

[12] Q: Can you tell me from the bill when the first [13] change was made?

[14] A: Probably mid April of '97.

[15] Q: So — all right. And the work that was [16] done in connection with this 6926-007-20 CONT was not [17] in connection with the revival effort, was it?

[18] MR. USDIN: Objection, vague.

[19] A: The 002 case was already revived before we [20] began the 007 continuation.

[21] Q: Okay. Is 007 going to lead to a new [22] patent?

[23] MR. LIPMAN: Objection, speculation.

Page 27

[1] Q: Is it intended to lead to a new patent?

[2] A: Yes.

[3] Q: Any decision from the patent office on [4] that?

[5] A: No.

[6] MR. LIPMAN: Hold on a second. I didn't [7] hear the question.

[8] MR. WOLBRETT: Any decision from the [9] patent office on that, and the answer was no.

[10] MR. LIPMAN: I heard the answer. I just [11] didn't hear the question. I was just asking as a [12] courtesy to hear the question again.

[13] Q: Was the work that you did for Axonn in [14] connection with the revival of the abandoned [15] application — was that the first time you had done [16] work for Axonn?

[17] A: Yes.

[18] Q: Can you tell me how it came about that you [19] did this work, that you were engaged to do this work? [20] In other words, did they call you and say we want you? [21] Did they interview you? How did this come about? Do [22] you know?

Page 28

[1] MR. LIPMAN: I object to the question [2] to the extent it seeks disclosure of privileged or work [3] product information.

[4] MR. WOLBRETT: I'm not asking for [5] communications. I'm just trying to find out [6] mechanically what happened.

[7] MR. LIPMAN: Nevertheless, I have the same [8] objection and the same caution to the witness. You [9] may answer it, but in answering it, please don't [10] reveal the substance of any privileged or work product [11] information that might be raised in that question.

[12] THE WITNESS: I was contacted by Axonn.

[13] BY MR. WOLBRETT:

[14] Q: Who at Axonn contacted you?

[15] A: Michael Eckstein.

[16] Q: And did you have any work that was

to other (17) people besides you? In other words, was it a beauty (18) contest or were you the guy?

(19) MR. USDIN: Objection. I think that's (20) probably going to call for the disclosure of the (21) substance of his communications. You don't want him (22) to get into that.

Page 29

(1) Q: All right. Michael Eckstein contacted you (2) and ultimately you began working on this project to (3) revive the abandoned patent?

(4) A: That's true.

(5) Q: What did you do in order to prepare (6) yourself to work on this case?

(7) MR. LIPMAN: I object to the question. To (8) answer that question would reveal the mental processes (9) and thoughts of Mr. Kuesters on behalf of his client, (10) which would involve the disclosure of privileged or (11) work product information. As a result, I instruct the (12) witness not to answer the question.

(13) Q: Counselor, we have received unredacted (14) bills for Mr. Kuesters detailing meetings, review of (15) the decision, the PTO's decision, portions of the file (16) history, discussions with Mr. Eckstein, obtaining the (17) file wrapper history. I think any — I'm not asking (18) for communications, I'm asking what he reviewed, and (19) I don't see that that's privileged and I certainly (20) think it's been waived if it was at all, so I ask you (21) to reconsider in light of the fact that these have (22) been disclosed to us already.

Page 30

(1) MR. USDIN: Any — there is no waiver. The (2) privilege has continually been asserted and there has (3) been no waiver. If there was any documents that were (4) inadvertently produced, then that's an inadvertent (5) production. But notwithstanding that, that is not a (6) waiver of any privilege. We stand by our privilege.

(7) BY MR. WOLBRETTE:

(8) Q: I certainly don't want to get into a legal (9) argument. Obviously we're going to have one later. A (10) claim is being made for the fees that Mr. Kuesters (11) charged. We have a right to inquire what he did to (12) earn those fees to determine whether they are proper, (13) necessary, appropriate, reasonable and related to this (14) case. And so I guess I'll ask it specifically. (15) Mr. Kuesters, is the first entry that you have of time (16) in connection with the revival effort of the abandoned (17) patent and application April the 4th, 1995?

(18) MR. LIPMAN: Objection, lacks foundation.

(19) Q: Could you review your bill and

see?

(20) MR. LIPMAN: The question assumes facts not (21) in evidence.

(22) MR. USDIN: Can I see?

Page 31

(1) MR. WOLBRETTE: This is the file of bills (2) that Axonn turned over to us, and there are no (3) redactions on the bills themselves as far as I can (4) see.

(5) MR. LIPMAN: Let's go off the record for a (6) second.

(7) (Discussion off the record)

(8) BY MR. WOLBRETTE:

(9) Q: Mr. Kuesters, you have in front of you the (10) bills that you are producing today, right?

(11) A: That's correct.

(12) Q: And we've been talking about them. And we (13) will mark them as an exhibit. I don't know what (14) number we're going to give to them. We'll make it (15) Defendant 1. We'll ask the court reporter to mark the (16) bills as Defendant 1, okay, the bills produced in (17) response to the subpoena. Looking through those (18) bills, can you tell me whether the first day on which (19) you made a charge in connection with the revival (20) effort was April the 4th, 1995?

Page 32

(1) MR. LIPMAN: Go ahead.

(2) A: Not from the bills that I have in front of (3) me. These bills —

(4) Q: Do you not have the April 28, 1995 bill in (5) front of you?

(6) A: That's correct.

(7) Q: Was that bill removed as privileged from (8) the stack of bills that you're producing today?

(9) MR. LIPMAN: Objection to the form of the (10) question.

(11) A: Apparently it was not included by my (12) billing department.

(13) Q: I understand that sometimes things don't (14) get included inadvertently and that other times they (15) are intentionally taken out for other reasons. I'm (16) just trying to find out if it was something that was (17) intentionally taken out or was this something that was (18) inadvertently — can you explain why this was not put (19) in?

(20) MR. LIPMAN: Objection, foundation. Go (21) ahead. If you know, Mr. Kuesters, if you don't know, (22) don't guess.

Page 33

(1) A: I was told there was no bill for April.

(2) Q: Okay, Mr. Kuesters, I understand lawyers (3) have to depend on the bookkeeping department. I know (4) I do

and from time to time I'm embarrassed by things (5) that they do or don't do, so I appreciate that and I'm (6) certainly not accusing you of doing anything wrong or (7) improper, but I have a bill here from April 28, 1995 (8) that's previously been provided to me by Axonn in this (9) case, so I'll mark that bill as — or ask the court (10) reporter to mark that bill or copy of it because it's (11) the only copy I've got with me, as Defendant 2. So (12) let me show you that bill. In fact, it might be best (13) if we made a copy of this now. Can we do that now? (14) Make copies for everyone?

(15) (Documents were marked as Defendant's (17) Exhibit Numbers 1 and 2.)

(19) BY MR. WOLBRETTE:

(20) Q: Mr. Kuesters, I think I had given you a (21) copy of Defendant Number 2, the April 28, 1995 bill, (22) and asked you if 4/4/95 was the first time anything

Page 34

(1) was billed to this file?

(2) MR. LIPMAN: Which file?

(3) MR. WOLBRETTE: The 6926-0001-002.

(4) MR. LIPMAN: Objection, foundation, vague (5) and ambiguous.

(6) THE WITNESS: I don't know.

(7) BY MR. WOLBRETTE:

(8) Q: Do you have any record that indicates there (9) was any earlier billing than 4/4/95 on this file?

(10) MR. LIPMAN: Objection, vague and (11) ambiguous, lacks foundation. Counsel, why don't you (12) look at the file numbers. They're different. I'll (13) help you out here so we can speed up the process. (14) You're assuming facts that you haven't yet (15) established, so we're trying to help you here. We're (16) not making any progress.

(17) Q: I see. Well, this bill says, our reference (18) '6926/001/20SD, your reference, Wireless Alarm System, (19) re: petition to revive. Is that right?

(20) A: Yes.

(21) Q: Does this deal with the abandoned patent?

(22) A: Yes.

Page 35

(1) Q: Does this deal with the attempt to revive (2) the abandoned patent?

(3) A: Yes.

(4) Q: And there's only one abandoned patent that (5) you know about that you've worked on for Axonn; is (6) that correct?

(7) A: Yes.

(8) Q: This is the one that David Newman was (9) involved in as prior counsel to

Axonnn; is that right?

(10) A: Yes.

(11) Q: Now, did you work on any other attempt to (12) revive besides the one that's shown on this April (13) 28th, 1995 bill? Any other attempt to revive any (14) other Axonn patent?

(15) A: No.

(16) Q: Do you have any record of any bill going (17) out before April 28, 1995 on this file?

(18) MR. LIPMAN: What file?

(19) MR. WOLBRETTE: The file we — we're (20) talking about what's referenced in the April 28th, (21) 1995 bill.

(22) THE WITNESS: Under 6926/001/20SD, the

Page 38

(23) answer is I don't know.

(24) Q: Do you have any recollection sitting here (25) any earlier work other than as reflected on this (26) April 28th, 1995 bill, Defendant's Exhibit 2, in (27) connection with this file?

(28) MR. LIPMAN: Objection, vague and (29) ambiguous.

(30) A: I don't know.

(31) Q: How could you find out?

(32) A: I can call my billing department and ask (33) them for bills on the 001 case. I had forgotten that (34) there was — in our internal docketing, we assign a (35) different number once the case — once we actually (36) enter prosecution. The 001 case is different in terms (37) of short docket, indicating that it's not a patent (38) application and it was preliminary to our becoming of (39) record in the patent application. To the extent that (40) billing begins on this bill on April 4th, I don't know (41) if there was billing in March or earlier.

(42) Q: Is that something you can find out while (43) we're here today?

(44) A: Yes.

Page 37

(45) Q: At the next break, we'll ask if your (46) counsel agrees that we try to find that out if this (47) is, what I've marked as Defendant 2 is the first bill, (48) When would the file number have changed from 001 to (49) something else? I'm not talking about the date, but (50) what event would occur that would cause a change in (51) that?

(52) MR. LIPMAN: Objection, lacks foundation.

(53) A: When we had a live patent application that (54) we were responsible for.

(55) Q: Would that be at the point — I don't know (56) what the exact term is in the patent field, but did (57) you become

the official counsel for Axonn when you (58) enter an appearance? Is that the point?

(59) MR. LIPMAN: Objection, hypothetical.

(60) A: In this case, I don't recall exactly what (61) the switch-over date was, but generally that's (62) correct.

(63) Q: I'm just trying to understand the basic (64) concept here. All right. Well —

(65) A: The 001 bills and the 002 bills refer to (66) the same revival effort.

Page 38

(67) Q: I appreciate that. I think I understand (68) it now. And what you have in the track in front of you (69) that's been marked Exhibit 1 I didn't have the 001 (70) bills; is that correct?

(71) A: Correct.

(72) Q: Is there any way that you can tell from (73) this April 28th bill, Defendant 2, when the file was (74) opened?

(75) MR. LIPMAN: Objection, vague and (76) ambiguous.

(77) A: I don't understand the question.

(78) Q: Well, some file systems, some law systems (79) have a code in it that can tell you when the file was (80) first opened, or sometimes there are entries made that (81) indicate that. I'm just asking you if you can tell (82) from what's on this page —

(83) A: No.

(84) Q: Do you have a recollection of when it is (85) that you were first hired by Axonn?

(86) MR. LIPMAN: Objection to the extent the (87) question calls for a legal conclusion.

(88) A: I don't recall when I first talked to

Page 33

(89) Michael Eckstein. It was obviously before April 4th, (90) 1995.

(91) Q: Okay. On April the 4th, 1995, did you (92) resubmit PTO's decision on the petition and portions (93) of the file history and the application?

(94) MR. LIPMAN: Objection as to form. First, (95) are you asking based upon the document in front of him; (96) the says that that you just read or are you asking (97) for an independent recollection, and nevertheless, (98) object to the question since it calls for disclosure (99) of attorney-client information and work product (100) information and the thought processes engaged in by (101) his witness.

(102) MR. WOLBRETTE: Are you instructing him not (103) to answer the question?

(104) MR. LIPMAN: Well, first clarify what the (105) question is. Axonn is instructing him not to answer (106) the question.

(107) BY MR. WOLBRETTE:

(108) Q: Sitting here today, can you tell me from (109) your memory — and you may refer to this bill as you (110) wish to refresh your memory — do you have a

Page 40

(111) recollection sitting here today that on April the 4th, (112) 1995 you reviewed the PTO's decision on the petition (113) and portions of file history and application, SN?

(114) MR. USDIN: Objection as to form. I'm not (115) sure what you're asking him. You say sitting here (116) today based on his recollection. Then you tell him to (117) refer to the document. I object to the form of the (118) question.

(119) MR. WOLBRETTE: You don't understand the (120) concept of refreshing your recollection?

(121) MR. USDIN: Well, it's two different (122) questions is the problem. I do understand the concept (123) very well. What I don't understand is a question that (124) confuses the two concepts.

(125) BY MR. WOLBRETTE:

(126) Q: I see. I'll try to unconfuse it. Counsel, (127) Does this bill indicate that on 4/4/95 you, Eckhard (128) Kuesters, reviewed the PTO's decision on petition and (129) portions of the file history, application (130) SN07/782,345?

(131) MR. LIPMAN: Objection. The document (132) speaks for itself.

Page 41

(133) MR. WOLBRETTE: You can answer.

(134) MR. LIPMAN: You can tell him what the (135) document says.

(136) BY MR. WOLBRETTE:

(137) Q: Does it indicate that?

(138) MR. LIPMAN: You may confirm to him that (139) what he read was the correct reading because that's (140) what he's asking you to do.

(141) A: Referring strictly to the document, the (142) document doesn't say that.

(143) Q: Does the document say — the document does (144) say 4/4/95, review PTO's decision on petition and (145) portions of file history and application SN07/782,345. (146) Did I read that correctly?

(147) A: Correct.

(148) Q: Well, that is something for which a charge (149) is being applied, is it not?

(150) A: Uh-huh.

(151) Q: Is that correct?

(152) MR. LIPMAN: Just say yes or no or if you (153) don't know, say you don't know.

Page 42

[11] Q: Okay. Who did that?
[12] A: I did that. I believe I did that.
[13] Q: Why do you believe you did that?
[14] MR. LIPMAN: Well, I object to the [15] question. The question calls for disclosure of [16] privileged or work product information and the thought [17] processes of the witness and I'm instructing him not [18] to answer the question.

[19] MR. WOLBRETTE: Are you instructing him not [19] to answer the question of why he believes that to be [11] the case?

[12] MR. LIPMAN: Yes, exactly.

[13] BY MR. WOLBRETTE:

[14] Q: On 4/4/95, did you discuss your view of the [15] PTO's decision of petition and portions of file [16] history and application SN07/782,345 with Michael [17] Eckstein?

[18] MR. LIPMAN: Same instruction, same [19] objection.

[20] MR. WOLBRETTE: Are you instructing him not [21] to answer?

[22] MR. LIPMAN: Yes.

Page 43

[11] Q: And Mr. Kuesters, you're going to follow [12] the instructions of your counsel not to answer. I [13] assume?

[14] A: I am.

[15] Q: In every case, are you? I mean, I can ask [16] you every time whether you're following his [17] instruction, but I don't really need to do that [18] because you are going to follow his instructions?

[19] A: That's correct.

[20] Q: Did you contact David Newman on April the [21] 6th, 1995 in connection with the petition to revive?

[22] MR. LIPMAN: Are you asking that question [23] independent of the document or based upon his memory? [24] Let's turn the document over. I don't care how you do [25] it. Counsel, but let's make clear what you're doing.

[26] BY MR. WOLBRETTE:

[27] Q: I'm asking him if he contacted David [28] Newman. He can look at anything he wants. I don't [29] care what he looks at. Did you contact David Newman [30] on April the 6th, 1995?

[31] MR. LIPMAN: Object to the form and it [32] also lacks foundation.

Page 44

[11] MR. USDIN: I think the objection I'm [12] making is that it's not clear whether you're asking [13] him of independent recollection or does this bill [14] state that that happened, or I guess third, does the [15] bill refresh his recollection that that's what [16] happened. But it's three different questions and it's not clear to me

which one you're asking.

[18] BY MR. WOLBRETTE:

[19] Q: Do you remember having a conversation with [20] David Newman on April the 6th, 1995? Let the record [21] reflect that Mr. Kuesters' counsel has turned the [22] April 28th, 1995 bill over. Do you recall having a [23] conversation with Mr. Newman on April the 6th, 1995?

[24] A: I have no independent recollection of on [25] what days I had conversations with David Newman.

[26] Q: How many conversations do you recall having [27] with David Newman?

[28] A: I have no count in my mind, although they [29] are numerous.

[30] Q: The bill in front of us says that you [31] discussed with Mike Eckstein on 4/4 your review of the [32] file history, does it not? That's what it indicates.

Page 45

[11] MR. LIPMAN: You want him to look at the [12] bill now?

[13] MR. WOLBRETTE: Yes.

[14] MR. LIPMAN: Is that what the bill says?

[15] A: Yes.

[16] Q: Do you have any notes or written memoranda [17] of your conversation with Mike Eckstein on that date?

[18] A: No.

[19] Q: When you do these bills, you try to be [20] accurate, don't you?

[21] MR. LIPMAN: Objection, foundation.

[22] A: When I do my bills I try to be accurate.

[23] Q: All right. And if you would put down an [24] entry that something happened on a particular day, [25] is it because that's the day it happened, right?

[26] A: Yes.

[27] Q: And I assume when you do this that you are [28] careful about making sure that the days are correctly [29] recorded that certain events happened; is that [30] correct?

[31] MR. USDIN: I object to the form of the [32] question as to what you assumed.

Page 46

[11] BY MR. WOLBRETTE:

[12] Q: You're right. When you go through and bill [13] a client and there are certain events recorded on [14] certain days, you're careful, aren't you, to make sure [15] that those dates are accurate?

[16] A: Yes.

[17] Q: I understand that from time to time [18] mistakes can happen, but you try to make sure that [19] they don't, do you not?

[20] A: I try to avoid mistakes.

[21] Q: And you review the bills before

they go [12] out?

[13] A: Yes.

[14] Q: All right. And how do you get the dates [15] that you put down on the bills? Do you take them from [16] time sheets, do you record them concurrently, are [17] there notes? Can you explain to me how that happens?

[18] MR. LIPMAN: Objection, form.

[19] Q: Go ahead.

[20] A: Generally concurrently.

[21] Q: So would you believe that the dates and the [22] events that are recorded on Defendant Exhibit 2 are an

Page 47

[11] accurate representation as to when things occurred?

[12] MR. LIPMAN: Objection, foundation.

[13] A: I believe so.

[14] Q: Before we go on with this, let me ask you [15] something about what your role is in this case, our [16] case. Have you been consulted as an expert by the [17] attorneys for Axonn?

[18] MR. LIPMAN: Objection, vague and [19] ambiguous, and I object to the form of the question [20] and also object to the extent it calls for disclosure [21] of privileged or work product information in the [22] question as phrased and I instruct the witness not to [23] answer it.

[24] Q: Have you been asked to give an opinion as [25] to whether David Newman breached the standard of care [26] for patent lawyers in his handling of this matter?

[27] MR. LIPMAN: Objection. To answer that [28] question, assuming it could be answered, would reveal [29] privileged or work product information relative to [30] this lawsuit and I instruct the witness not to answer [31] that question. And I'm sure it also probably violates [32] the pretrial order by the court in this case, of which

Page 48

[11] I have no knowledge.

[12] MR. WOLBRETTE: I just want to make sure I [13] understand. You're counsel for Mr. Kuesters, you are [14] not counsel for Axonn; is that correct?

[15] MR. LIPMAN: I am counsel for Mr. Kuesters [16] and the Oblon, Spivak firm.

[17] MR. WOLBRETTE: You're not counsel for [18] Axonn?

[19] MR. LIPMAN: That is absolutely correct.

[20] MR. WOLBRETTE: I have heard no objection [21] from Axonn's counsel to that question. I just want to [22] make sure, do you all object?

[23] MR. USDIN: I join in the objection. I didn't, but unless you want us

both to object to each [115] question. So far we have not been doing that.

[116] MR. WOLBRETT: You represent different [117] parties, so I think you're going to have to do that.

[118] MR. USDIN: Then I join in the objection to [119] the question as phrased. This witness has been [120] subpoenaed as a fact witness.

[121] MR. WOLBRETT: I understand that, and I'm [122] trying to find out if in addition to the facts that he

Page 49

[11] is aware of, if he has any other role in the [12] litigation.

[13] MR. LIPMAN: Why don't you ask him, for [14] instance, I mean — you know how to do this. Ask him [15] has he spoken to counsel. Let's take it one step at a [16] time so you can get some information and you won't get [17] others. But you want to go right for the home run in [18] the first question, my objection stands.

[19] BY MR. WOLBRETT:

[110] Q: Have you been paid anything, any fee in [111] connection with this litigation that brings us here [112] today as opposed to the patent work that you did work [113] for Axonn?

[114] MR. LIPMAN: You mean such as the fee that [115] came with the subpoena?

[116] MS. MANNING: That was not paid by Axonn.

[117] BY MR. WOLBRETT:

[118] Q: Have you been paid anything by Axonn or [119] Axonn's attorneys other — in connection with the [120] litigation that brings us here today as opposed to the [121] work that you do for them on patents?

[122] A: No.

Page 50

[1] Q: Have you been asked to send them a bill for [2] time or services in connection with this litigation?

[3] MR. LIPMAN: Objection. To answer that [4] question would reveal privileged or work product [5] information and I instruct the witness not to answer [6] the question.

[7] MR. USDIN: I join in the objection.

[8] BY MR. WOLBRETT:

[9] Q: Have you met with counsel for Axonn in this [10] case?

[11] MR. LIPMAN: You may answer the question [12] yes or no.

[13] THE WITNESS: What do you mean by "meet"?

[14] BY MR. WOLBRETT:

[15] Q: Talk to them on the telephone or in person.

[16] Q: Okay. Now, did you ever speak to him for himself and for the

[117] Q: About this case, this litigation that [118] brings us here today.

[119] A: Yes.

[120] Q: How many times have you done so?

[121] A: Please clarify the question.

[122] Q: I'm not interested in discussions that you

Page 51

[1] may have had about the weather or the Washington, D.C. [2] area or what time you might be available for this [3] deposition. I'm asking you have you ever talked to [4] them, met with them, provided them with any [5] information concerning the substance of the [6] litigation, either what happened, what your role —

[7] A: What happened —

[8] MR. LIPMAN: Let him finish the question [9] before you answer it. Are you finished?

[10] BY MR. WOLBRETT:

[11] Q: No. Either what occurred during your [12] attempt to revive, your view of David Newman's [13] behavior, what David Newman may have told you, any of [14] those sort of items? So the question I'm asking you [15] is have you met or how many times have you met with [16] counsel for Axonn in connection with this litigation?

[17] MR. LIPMAN: I object to the form of the [18] question. I'm still not sure what it is. It's that [19] last question, how many times have you met, if that's [20] the question —

[21] BY MR. WOLBRETT:

[22] Q: That's the question, Counselor. How many

Page 52

[1] times have you met?

[2] A: There's no foundation.

[3] Q: I'm sorry. You're now objecting to my [4] questions too?

[5] MR. LIPMAN: Counsel, he asked you to [6] clarify between phone calls and meetings. You refused [7] to do that.

[8] Q: How many times have you spoken on the [9] telephone with counsel for Axonn in this litigation?

[10] A: No foundation.

[11] MR. LIPMAN: Well, wait. Mr. Kuesters, if [12] you can answer the question, fine. He's assuming of [13] course you did speak by telephone, so since he won't [14] ask the question cleanly, just tell him yes or no or I [15] don't know or I never spoke to him, so maybe we can [16] speed up the process.

[17] MR. WOLBRETT: Well, if you've never [18] spoken to him, the answer is

zero.

[19] MR. LIPMAN: Well, he's asking as a [20] foundation question. You're an experienced lawyer. [21] Say "Did you ever speak by phone?" "Yes." "How many [22] times?" I mean, that's the way it goes.

Page 53

[1] BY MR. WOLBRETT:

[2] Q: Thank you, Counselor. How many times — [3] that asks for a number. How many times have you [4] spoken on the telephone with counsel for Axonn? If [5] you've never spoken to them, tell me that.

[6] A: I don't know what you mean by "about this [7] litigation."

[8] Q: Okay. Do you know what this litigation is [9] about?

[10] A: I believe it's malpractice.

[11] Q: Right. And do you understand that it has [12] to do with the abandoned patent?

[13] A: Yes.

[14] Q: And it has to do, since it's malpractice, [15] with the conduct of David Newman while he was the [16] patent lawyer for Axonn in connection with this [17] particular application, correct?

[18] MR. LIPMAN: Objection, foundation, also to [19] the extent it seeks a legal conclusion, I object to [20] it.

[21] BY MR. WOLBRETT:

[22] Q: Do you understand that?

Page 54

[1] A: Would you repeat the question?

[2] MR. LIPMAN: Why don't you just have her [3] read it back?

[4] Q: No, let's just go on. Mr. Kuesters, you [5] obtained — as part of your effort to revive, you [6] obtained a declaration from Mr. Newman, did you not?

[7] A: Yes.

[8] Q: Which was filed in the patent office as [9] part of your first revival attempt; is that correct?

[10] MR. USDIN: As part of his first revival?

[11] MR. WOLBRETT: Yes.

[12] MR. USDIN: You're talking about the one [13] that Mr. Kuesters did as opposed to any other revival [14] efforts?

[15] BY MR. WOLBRETT:

[16] Q: Right. Now, according to this April 28th, [17] 1995 bill, Exhibit 2, you were reviewing the revised [18] draft declarations of Newman, Perilli, Criss and [19] Molvin, and discussing them with David Newman on [20] 4/28/95; is that correct? You can look at them.

[21] MR. LIPMAN: Objection. The exhibit in question [22] speaks for itself and to the

extent the question calls

Page 55

[1] for the revelation of privileged or work product [2] information, I instruct the witness not to answer the [3] question.

[4] MR. WOLBRETTE: Could you explain to me how [5] his conversations with David Newman are privileged?

[6] MR. LIPMAN: I voiced my objection. I [7] don't want to take time to discuss —

[8] MR. WOLBRETTE: Well, you understand that [9] we're going to be seeking expenses, and I just want to [10] — this is not — I don't mean this be unfriendly in [11] any way, but —

[12] MR. LIPMAN: I don't take it at all.

[13] MR. WOLBRETTE: You understand we're going [14] to be seeking expenses and so forth in connection with [15] his refusal to answer these questions.

[16] MR. LIPMAN: I don't understand that, but [17] now that you're saying that, I understand that that's [18] what your possible intent would be, sure.

[19] MR. WOLBRETTE: Okay.

[20] MR. LIPMAN: And I hope you understand that [21] if you ask properly phrased questions that don't [22] involve the revelation of privileged or work product

Page 56

[1] information, I will not instruct the witness not to [2] answer the question.

[3] Q: Apparently everything I ask about this bill [4] is privileged, according to you. I'm going to show [5] you what we're going to mark — if we've already [6] marked something as a plaintiff's exhibit —

[7] MR. USDIN: As long as it's the same one.

[8] MR. WOLBRETTE: We might as well use that [9] same one.

[10] BY MR. WOLBRETTE:

[11] Q: I'm going to show you what's been [12] previously marked as P-59 and P-58 in prior [13] depositions; P-59 being a cover letter to David [14] Newman, and P-58 being the request for reconsideration [15] which you filed. Is that exhibit, that is, the 58, is [16] that the petition or revival effort that you first [17] filed on behalf of Axonn in this case, in the [18] abandoned patent case?

[19] A: It's an effort that I filed. I don't know [20] if it was the first one or not.

[21] Q: And does that contain attached to it the [22] declaration of Mr. Newman?

Page 57

[1] MR. LIPMAN: Objection as to form.

[2] A: Yes, it does.

[3] Q: And what is the date that Mr. Newman [4] executed the declaration?

[5] MR. LIPMAN: Objection. The question lacks [6] foundation. The document speaks for itself.

[7] A: April 28, 1995.

[8] Q: And had you consulted with Mr. Newman or [9] talked to Mr. Newman about this document before he [10] signed this particular version of it?

[11] MR. LIPMAN: Objection, lacks foundation.

[12] A: Yes, I did.

[13] Q: And, had you seen drafts and revised drafts [14] of it before it came into this form?

[15] A: I don't recall.

[16] Q: But you had — you do recall talking to [17] David Newman about what was to go into that [18] declaration, do you not?

[19] MR. LIPMAN: Objection, form.

[20] A: Yes.

[21] Q: And the point of that declaration was to [22] show that because of various things that were going on

Page 58

[1] in Dr. Newman's office and his life, that he had [2] missed the deadline date of February the 19th for [3] supplying a document to the patent office; is that [4] correct?

[5] MR. USDIN: Objection as to form and lacks [6] foundation, assumes facts not yet in evidence.

[7] Q: You can answer.

[8] A: The point was to explain the circumstances [9] which I was told by David Newman led to the [10] abandonment.

[11] Q: And those circumstances included his [12] medical problem with his feet, right?

[13] MR. LIPMAN: Objection, lacks foundation.

[14] Q: Is that correct?

[15] A: Yes.

[16] Q: And problems with his office staff; is that [17] correct?

[18] MR. LIPMAN: Objection, lacks foundation.

[19] A: Yes.

[20] Q: And the crashing of his docket system?

[21] MR. LIPMAN: Objection, lacks foundation [22] and form.

Page 59

[1] Q: Is that right?

[2] A: Yes.

[3] Q: And the conclusion was that because of all [4] of those things, he had

missed the deadline of [5] February the 19th; is that right?

[6] MR. USDIN: Object to the form. What [7] conclusion are you referring to?

[8] Q: You can answer.

[9] MR. LIPMAN: Also, the question lacks [10] foundation.

[11] A: Well, I'm not sure whose conclusion you're [12] referring to.

[13] Q: The conclusion in the declaration.

[14] MR. LIPMAN: Objection. The document [15] speaks for itself.

[16] A: I'm sorry. What was the conclusion?

[17] Q: Yes. The question was that the conclusion [18] was that because of all those things that we just [19] discussed, David had missed the deadline to file [20] something in the patent office.

[21] MR. LIPMAN: Objection, form, foundation, [22] assumes facts not in evidence, and it's vague and

Page 60

[1] ambiguous.

[2] A: To the extent that I understand the [3] question, the answer is yes.

[4] Q: Now, when you were talking to David, [5] various times you were talking to him about this [6] affidavit, did you disclose to him that Axonn had [7] filed a lawsuit against him alleging malpractice in [8] federal court in New Orleans?

[9] MR. LIPMAN: Objection, foundation.

[10] MR. USDIN: I join in the objection. It's [11] also unclear as to time.

[12] A: During what time frame?

[13] Q: Prior to his signing this declaration, [14] which was April the 28th, 1995.

[15] MR. LIPMAN: Objection, assumes facts not [16] in evidence.

[17] MR. WOLBRETTE: What fact does it assume?

[18] MR. LIPMAN: It assumes the fact of when [19] this thing was signed. Just because there's a date on [20] it, how is this witness supposed to know when it was [21] signed? Did you ask him that? Mr. Newman would know [22] that. That's a foundational question, Counsel.

Page 61

[1] MR. USDIN: And as to what this witness [2] knew as of any date.

[3] Q: Prior to April the 28th, 1995, did you [4] advise Mr. Newman while you were talking to him about [5] this declaration that he had been sued by Axonn in [6] federal court in New Orleans?

[7] A: No.

[8] Q: Did you know that he'd been sued?

[9] MR. LIPMAN: Objection, form.

[10] A: I learned that he was sued.
[11] Q: Did you learn before or after April the 12th 28th, 1995?
[12] A: I don't recall. I did not know before the [13] fact.
[14] Q: What do you mean by "the fact"?
[15] A: I did not know that he was sued before he [16] was sued.
[17] Q: But —
[18] A: Well, I learned that —
[19] MR. LIPMAN: Wait. Just let him ask the [20] question.
[21] Q: Sometime after he was sued, you did learn

Page 52

[22] that; is that correct?
[23] A: Correct.
[24] MR. LIPMAN: Objection, vague and [25] ambiguous.
[26] Q: And from whom did you learn that?
[27] A: Michael Eckstein.
[28] Q: What did Mr. Eckstein tell you about the [29] lawsuit against Mr. Newman?
[30] MR. USDIN: I object as to that question on [31] its face calls for privileged communications.
[32] MR. WOLBRETTE: Is he allowed to answer it [33] or not?
[34] MR. USDIN: No. That's privileged.
[35] Q: Did he tell you what was the nature of the [36] lawsuit?
[37] MR. USDIN: Same objection as to privilege. [38] That calls for privileged communications between [39] Mr. Kuesters and his client.
[40] Q: Did he provide you with a copy of the [41] lawsuit? He meaning Mr. Eckstein.
[42] MR. LIPMAN: Did you say a copy of the [43] lawsuit?

Page 63

[44] MR. WOLBRETTE: That's what I said, copy of [45] the lawsuit.
[46] MR. LIPMAN: I guess you mean the [47] complaint? Is that what you mean?
[48] MR. WOLBRETTE: That's what I mean.
[49] THE WITNESS: No.
[50] BY MR. WOLBRETTE:
[51] Q: And sitting here today, you cannot tell me [52] positively that when you talked to Michael — I'm [53] sorry — that what you talked to David Newman [54] concerning the matters contained in his declaration [55] [12] that you had no knowledge of the lawsuit? You can't [56] tell me one way or the other; is that correct?

[57] MR. LIPMAN: Objection, form, vague, and [58] ambiguous.
[59] A: I can't say or not say. I don't know.

[60] MR. LIPMAN: Just so the record is clear, [61] you can't say because you don't know or you can't say [62] because —
[63] A: I don't recall. I don't recall exactly [64] when I learned of the lawsuit in relation to the time [65] frame of preparing a prosecution of the 002 case.

Page 64

[66] Q: Did David Newman at any time talk [67] you [68] about the lawsuit?
[69] A: Which lawsuit?
[70] Q: Sorry. The suit that had been filed by [71] Axonn against Newman in Federal Court alleging [72] malpractice, the one that brings us here today.
[73] A: I don't recall exactly.

[74] Q: Your bills that you have in front of you [75] that are Defendant Exhibit 1 reflect that on August [76] the 15th you had a telephone discussion with David [77] Newman initiated by David Newman.

[78] MR. LIPMAN: Could you help us out with [79] [13] page? I think we found it.

[80] Q: I don't know if you have it or not since I [81] don't have a copy of that in front of me. I have an [82] August 31, 1995 bill, client matter 6926.0002, invoice [83] number 313760.

[84] A: That's what the bill says.

[85] Q: During that conversation, did Mr. Newman [86] not tell you that he had been sued, and did you not [87] tell him that you had no knowledge of that suit until [88] one week prior to your phone conversation of that day?

Page 65

[89] MR. LIPMAN: Objection, form, compound.

[90] A: I don't recall.

[91] Q: Mr. Kuesters, do you see anything improper, [92] unethical, immoral about talking to a person, whether [93] a lawyer or not, and seeking information from him [94] about a subject upon which he has been sued without [95] him knowing he's been sued?

[96] MR. LIPMAN: Objection, hypothetical, [97] compound, complex, seeks expert opinion. This witness [98] has been subpoenaed to give factual testimony. Based [99] upon those objections, I instruct the witness not to [100] answer the question.

[101] MR. USDIN: I join in all of those [102] objections.

[103] Q: Do you personally have a problem, do you [104] personally feel it would be a problem for you as a [105] lawyer to seek information from someone on behalf of [106] your client when you know that [107] that person conducting the investigation is not a [108] person who you have any relationship with, any connection with?

seeking [109] information?

[110] MR. LIPMAN: Objection, hypothetical, [111] compound, complex, seeks expert opinion, goes beyond

Page 66

[112] the scope of the subpoena. For those reasons, I [113] instruct the witness not to answer the question.

[114] MR. USDIN: I join in all of the [115] objections.

[116] Q: Mr. Kuesters, do you have any record in [117] your files of when you learned about the lawsuit [118] against Mr. Newman by Axonn?

[119] MR. LIPMAN: I think it's been asked and [120] answered, but go ahead, Mr. Kuesters.

[121] A: No, I don't.

[122] Q: So it's possible that you, Mr. Kuesters, [123] could have discussed the Affidavit — or the [124] declaration of April the 28th, 1995 with Mr. Newman [125] after you learned that there was a lawsuit against [126] him?

[127] MR. LIPMAN: Objection.

[128] MR. USDIN: Objection.

[129] Q: Is that possible?

[130] MR. USDIN: Objection. On its face, it [131] requests speculation.

[132] MR. LIPMAN: Well, to the extent I feel [133] I have to join in, which I don't feel that way, I

Page 67

[134] certainly join in.

[135] A: I don't think that's — I don't know.

[136] Q: That's not something that you would just [137] not do?

[138] MR. LIPMAN: Objection, form. I don't [139] understand that question at all, and to the extent [140] it's a follow-up to the other one, it's taking [141] speculation to another degree.

[142] A: I agree with his objection.

[143] Q: You can't tell me that that's something [144] that you simply — that's not a practice you would [145] simply not engage in?

[146] MR. USDIN: Objection to form. I'm not [147] sure what your references are in that question.

[148] MR. LIPMAN: I'll add the further objection [149] it's argumentative. You asked the question the third [150] time. You're arguing with the witness.

[151] Q: No, I'm not arguing. The witness doesn't [152] have any recollection sitting here. He says it's [153] possible. I'm trying to find out based on this [154] witness' practices, his beliefs, his conscious, his [155] understanding of the ethics rule of any other thing that

Page 68

[11] he has knowledge of, whether this is something that he [12] simply — I'm giving you the opportunity to say this [13] is something I simply wouldn't engage in.

[14] A: I want to say one thing.

[15] MR. LIPMAN: Let me voice my objection. [16] Based upon that clarification, the question is [17] certainly argumentative, and now you've taken it to [18] another degree of argumentation. Now you're adding a [19] moral view. You're seeking expert opinion from this [110] witness based upon his understanding of the ethical [111] rules, which you have no foundation for, and you're [112] going way, way beyond the scope of this subpoena. I [113] have the same objections and I'll instruct the witness [114] not to answer the question.

[115] MR. WOLBRETTE: I'm entitled to find out if [116] he doesn't have a recollection —

[117] MR. LIPMAN: Ask him that question.

[118] Q: I'm entitled to find out whether it's more [119] likely than not that he would do such a thing, and I [120] think I'm entitled to find out based on his personal [121] practices and beliefs if he thinks this is something [122] that he might do. Now, if I'm not articulating the

answered.

[123] Q: Did Mr. Newman while you were talking to [124] him about the declaration before he signed it, did he [125] ever express to you a concern that he might be sued?

[126] A: Yes.

[127] Q: And in response to his concern that he [128] might be sued did you tell him — what did you tell [129] him?

[130] A: I told him that that was possible. I also [131] told him that I thought it was best to try to get this [132] case revived to mitigate damages in the event that a [133] suit would be filed.

[134] Q: Mr. Kuesters, you would not have told him [135] that it was possible that he would be sued if you knew [136] that he had already been sued, would you?

[137] MR. LIPMAN: Objection to the form of the [138] question. It's argumentative and it's speculative.

[139] Q: Go ahead and answer.

[140] A: Yes, I would not have told him that.

[141] Q: And you were straight with Mr. Newman, [142] weren't you?

[143] A: Yes.

Page 71

[144] Q: So now that we've been through that, can [145] you say now that you were not aware of the lawsuit [146] when you talked to Mr. Newman in April 1995 about his [147] declaration?

[148] MR. LIPMAN: Objection to the form of the [149] question and foundation.

[150] MR. USDIN: And this has been asked and [151] answered.

[152] THE WITNESS: Again, I have no independent [153] recollection of exactly when I learned from Michael [154] Eckstein when suit was filed.

[155] BY MR. WOLBRETTE:

[156] Q: Based on your recollection that Mr. Newman [157] asked you about the suit and your telling him that it [158] was possible, do you think it is now more likely than [159] not that you did not know that a suit had been filed [160] when you talked to him about his declaration?

[161] MR. LIPMAN: Objection, seeks speculation, [162] and I think it has two or three "nots." I'm a little [163] confused, but go ahead.

[164] A: I think it's more likely than not.

[165] Q: That you had not been informed of the

[166] MR. LIPMAN: Could I ask you to hold on [167] just a moment?

[168] MR. WOLBRETTE: I'm sorry. Why don't we [169] take a five-minute break.

[170] (Recessed at 10:29 a.m.) [171] (Reopened at 10:38 a.m.)

[172] BY MR. WOLBRETTE:

[173] Q: Looking at your April 28, 1995 bill, which [174] has been marked D-2 if I'm not mistaken: is that [175] right?

[176] A: Yes.

[177] Q: Does that bill indicate that you had [178] conversations — and I'm not asking you for the [179] substance of those conversations, I'm just asking you [180] if the bill indicates that you had conversations with [181] Michael Eckstein on April 4th, 6th and 24th?

[182] MR. LIPMAN: Objection. The document [183] speaks for itself.

[184] A: Yes.

Page 73

[185] Q: Do you have a May bill in your stack? [186] Strike that. We're running out of time, so let's [187] forget that question. Let's go back to the April 28th [188] bill. Does that bill indicate that you spoken with [189] Britton Sanderford on April 6th and April 21st? [190] And again, I'm not asking you for the substance of [191] those conversations, just if that's what the bill [192] reflects.

[193] MR. LIPMAN: Objection. The document [194] speaks for itself.

[195] A: Yes.

[196] Q: And does it also show that you spoke with [197] Steve Fant on April the 21st and April the 28th?

[198] MR. LIPMAN: Objection. The document [199] speaks for itself.

[200] A: Yes.

[201] Q: Now I am going to ask you about the [202] substance of those conversations, and you may want to [203] pause after my question because I suspect there might [204] be an objection. At any time during any of these [205] conversations did Mr. Eckstein or Mr. Sanderford or [206] Mr. Fant advise you that Axonn had sued Newman for

Page 74

[207] malpractice in federal court in New Orleans?

[208] MR. LIPMAN: Objection, compound. Also, [209] the question seeks privileged or work product [210] information, and as a consequence, I instruct the [211] witness not to answer the question.

[212] MR. USDIN: I join in.

[213] Q: Did Mr. Fant tell you about a lawsuit that [214] had been filed against Mr. Newman in March of 1995 in [215] federal court in New Orleans during your con-

Page 70

[216] finished and the witness already

Page 72

[217] lawsuit, right?

[218] A: At that time.

[219] Q: The April bill —

versions [10] on April 21st and April 28th?

[11] MR. LIPMAN: Objection, assumes facts not [12] in evidence and seeks privileged or work product [13] information and I instruct the witness not to answer [14] the question.

[15] MR. USDIN: Same objection, and I'll join [16] and I think this is argumentative in view of the prior [17] line of questioning that you've been through with this [18] witness regarding what his recollection was, and that [19] you've already asked this witness what he knew.

[20] Q: Did Mr. Sanderford advise you about the [21] lawsuit Axonn filed against Mr. Newman in March of [22] 1995 when you spoke to him on April the 6th and April

the 21st?

[23] MR. USDIN: The same thing, objection. It [24] calls for disclosure of privileged communications. [25] It's also argumentative in view of the fact you [26] already asked this witness what he knew.

[27] MR. LIPMAN: I join in.

[28] Q: Did Mr. Eckstein when you spoke to him on [29] April the 4th, April the 6th and April the 24th in any [30] of those conversations advise you that Axonn had sued [31] Mr. Newman in March of 1995 in federal court of New [32] Orleans?

[33] MR. USDIN: Same objection, seeks the [34] disclosure of privileged communications, [35] attorney-client privileged communications; also is [36] argumentative in view of your previous questions and [37] the testimony regarding what this witness knew as [38] opposed to what was the substance of conversations he [39] had with his client.

[40] MR. WOLBRETTE: Is he being instructed not [41] to answer all these questions?

[42] MR. USDIN: Yes.

[43] MR. LIPMAN: And I am instructing him not

[44] to answer the question, and by me not joining in each [45] and every one should not be taken in any way that I do [46] not agree. If I disagree, I will certainly let you [47] know.

[48] MR. WOLBRETTE: Do you want to have just a [49] stipulation then that if one person objects, the other [50] person joins in unless you opt out?

[51] MR. USDIN: That sounds good.

[52] Q: And again, Mr. Kuesters, you're going to do [53] what your lawyers — the lawyer tells you?

[54] A: Yes, I am, unless I indicate otherwise.

[55] Q: Unless you opt out. I want to show you [56] what's been marked as P-14, a February 17, 1994 [57] memorandum to [58] [59] [60] [61] [62] [63] [64] [65] [66] [67] [68] [69] [70] [71] [72] [73] [74] [75] [76] [77] [78] [79] [80] [81] [82] [83] [84] [85] [86] [87] [88] [89] [90] [91] [92] [93] [94] [95] [96] [97] [98] [99] [100] [101] [102] [103] [104] [105] [106] [107] [108] [109] [110] [111] [112] [113] [114] [115] [116] [117] [118] [119] [120] [121] [122] [123] [124] [125] [126] [127] [128] [129] [130] [131] [132] [133] [134] [135] [136] [137] [138] [139] [140] [141] [142] [143] [144] [145] [146] [147] [148] [149] [150] [151] [152] [153] [154] [155] [156] [157] [158] [159] [160] [161] [162] [163] [164] [165] [166] [167] [168] [169] [170] [171] [172] [173] [174] [175] [176] [177] [178] [179] [180] [181] [182] [183] [184] [185] [186] [187] [188] [189] [190] [191] [192] [193] [194] [195] [196] [197] [198] [199] [200] [201] [202] [203] [204] [205] [206] [207] [208] [209] [210] [211] [212] [213] [214] [215] [216] [217] [218] [219] [220] [221] [222] [223] [224] [225] [226] [227] [228] [229] [230] [231] [232] [233] [234] [235] [236] [237] [238] [239] [240] [241] [242] [243] [244] [245] [246] [247] [248] [249] [250] [251] [252] [253] [254] [255] [256] [257] [258] [259] [260] [261] [262] [263] [264] [265] [266] [267] [268] [269] [270] [271] [272] [273] [274] [275] [276] [277] [278] [279] [280] [281] [282] [283] [284] [285] [286] [287] [288] [289] [290] [291] [292] [293] [294] [295] [296] [297] [298] [299] [300] [301] [302] [303] [304] [305] [306] [307] [308] [309] [310] [311] [312] [313] [314] [315] [316] [317] [318] [319] [320] [321] [322] [323] [324] [325] [326] [327] [328] [329] [330] [331] [332] [333] [334] [335] [336] [337] [338] [339] [340] [341] [342] [343] [344] [345] [346] [347] [348] [349] [350] [351] [352] [353] [354] [355] [356] [357] [358] [359] [360] [361] [362] [363] [364] [365] [366] [367] [368] [369] [370] [371] [372] [373] [374] [375] [376] [377] [378] [379] [380] [381] 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David Newman other than the (18) one that's attached to —

(19) THE WITNESS: Well, I may be wrong.

(20) BY MR. WOLBRETT: —

(21) Q: But you know, I could be wrong too, so (22) let's just try to move on. We've been talking about

Page 81

(1) Exhibit P-59 — 58, okay? The one that is stamped (2) received May the 1st in the office — is that the (3) patent office?

(4) A: Yes, that's the PTO stamp.

(5) Q: And that's the one that contains — or has (6) attached to it the declaration signed by David Newman (7) which says — which bears the date April the 28th, (8) 1995, correct?

(9) A: It includes the David Newman declaration (10) dated April 28th, 1995.

(11) Q: So for shorthand purposes, when I'm talking (12) in the next set of questions about the petition to (13) revise, I'm talking about that one that you've got in (14) your hand right there, okay? Do you understand me?

(15) A: Yes, I do.

(16) Q: At the time that you were preparing that (17) petition to revive, were you aware that Axonn had in (18) its files a memorandum dated February the 17th, 1993 (19) stating, "The problem now is that if we want to file a (20) disgruntled employee affidavit, it needs to be in the (21) patent office by this Friday?"

(22) A: No.

Page 82

(1) Q: Did you know at that time that, the time (2) that you were preparing this, the one in front of you, (3) the P-59, that Axonn had in its files a memorandum (4) dated February the 17th, 1993 that states, "It looks (5) like if we don't make a decision today, the decision (6) will be made for us and the patent will go abandoned?"

(7) MR. USDIN: You're asking if he knew they (8) had a memo stating that?

(9) BY MR. WOLBRETT: —

(10) Q: Yes.

(11) A: No.

(12) Q: When you were preparing that petition in (13) front of you, P-58 or 9 —

(14) MR. LIPMAN: The previous question had said (15) 59.

(16) Q: I'm sorry, I should say that. It is 58. (17) The cover letter's 59. When you were preparing P-58, (18) did you know that there was in Axonn's files a (19) document indicating that Axonn was aware that (20) something had to be filed by February the 19th or the (21) patent would go abandoned?

(22) MR. LIPMAN: Which compound question do you

Page 83

(1) want him to answer? The first one or the second one?

(2) MR. USDIN: I object to the form and ask (3) you if you would just restate it.

(4) Q: Did you know when you were preparing P-58 (5) that Axonn had in its files a document that indicated (6) that Axonn was aware that if something wasn't filed in (7) the patent office by February the 19th, the patent (8) would go abandoned?

(9) MR. LIPMAN: I object to the form of the (10) question. The witness of course is reading Exhibit (11) P-14. That wasn't your question. If you want to ask (12) that question, you may. The question's not limited to (13) P-14. It's anything, according to the way the (14) question's phrased.

(15) A: The answer is no.

(16) Q: Would that have made a difference to you?

(17) MR. USDIN: Objection, calls for (18) speculation.

(19) MR. LIPMAN: Also, I object to the question (20) because to answer it would reveal the mental processes (21) and thought processes of a lawyer as to what he might (22) do or might not do based upon a given situation. It

Page 84

(1) also seeks expert opinion as a result, and so for (2) those reasons, I instruct the witness not to answer (3) the question.

(4) Q: In P-58, you made several arguments as to (5) why the patent should be revived; is that correct?

(6) A: Yes.

(7) Q: And one of the arguments was based on 137A, (8) unavailability or unavoidable abandonment; is that (9) correct?

(10) MR. LIPMAN: Objection to the form of the (11) question. You can reread the document if you need to (12) to answer it.

(13) A: I'd have to review the document.

(14) Q: Sure. Take a look at it.

(15) A: One of the arguments was — renew the (16) petition to revive due to unavoidable abandonment (17) under 37 CFR 1.37A.

(18) Q: And that was the argument on which you used (19) Mr. Newman's declaration, was it not, the support for (20) that argument?

(21) MR. LIPMAN: Objection, form, vague and (22) ambiguous. The document speaks for itself.

Page 85

(1) A: The argument relied on Newman's declaration (2) to substantiate facts.

(3) Q: And wasn't the gist of the argument that (4) this patent abandonment was unavoidable because (5) Mr. Newman had missed the deadline of February the (6) 19th because of all of the various problems he was (7) having, with his foot, with his staff and with his (8) docket crashing?

(9) MR. LIPMAN: Objection, vague and (10) ambiguous. The document speaks for itself.

(11) A: Generally I believe that's true.

(12) Q: If in fact Axonn was aware of the February (13) 19th deadline and made a conscious decision to allow the (14) application to go abandoned, you could not in good (15) conscious submit — if you were aware of it, you (16) couldn't submit that argument that you're holding in (17) your hand, could you?

(18) MR. LIPMAN: Objection, hypothetical, (19) speculative, argumentative, seeks expert opinion, and (20) I instruct the witness not to answer the question. (21) This is a fact deposition based upon a subpoena for (22) this witness to give factual testimony, not expert

Page 86

(1) opinions.

(2) Q: I'll just ask one more on that line and you (3) can object and then I'll move on to something else (4) quickly because I understand you do need to leave at (5) 11:00. Is that — We can go a few minutes over?

(6) MR. LIPMAN: A couple of minutes, yes. If (7) that would help you, we're willing to go —

(8) MR. WOLBRETT: I'm really trying to accommodate you. We do need to go back to the (9) subpoena in one second.

(10) MR. LIPMAN: I appreciate that.

(11) Q: Let me ask you just one more question on (12) this line. If you had information in your possession (13) in April of 1995 prior to submitting P-58 to the (14) patent office that indicated to you that Axonn was (15) aware of the February 19th deadline and consciously (16) decided to allow it to pass for whatever reason, would (17) it violate your duty to the patent office, your duty (18) of candor, to have filed this document that's before (19) you?

(20) MR. LIPMAN: Objection, speculative, (21) hypothetical, argumentative, seeks expert opinion.

Page 87

(1) Besides, it goes to 37 CFR part 101.45 relating to the code of professional conduct.

responsibility for the patent and [1] trademark office, and it clearly seeks opinion from [4] this witness as to what he might do or what some other [5] lawyer might do under a given set of circumstances, [6] and I instruct the witness not to answer the question.

[7] Q: Okay. It is 11:00. I can assure you I have a lot more questions relating to his bills and [9] things that I presume that you would object to since [10] you've done in the past. And rather than go into that [11] now and waste time since you all need to leave, let me [12] return the subpoena and you're going to give us a few [13] more minutes to talk about that?

[14] MR. LIPMAN: Yes, I will. But just so it's [15] clear, you're assuming [16] I'll make objections based upon [17] the bills. Let's make it very clear, Counsel. I make [18] objections based upon questions, not on subject [19] matter.

[20] MR. WOLBRETTE: I think it's pretty clear [21] that every question I've asked him about anything on [22] the bill you've objected to.

[23] MR. USDIN: I don't agree with that.

[24] characterization.

[25] MR. WOLBRETTE: Do you want me to go back [26] to [27] the bills?

[28] MR. LIPMAN: You use the time remaining any [29] way you want.

[30] Q: We've been already dealing with the [31] subpoena response that this April 23, 1995 bill was [32] not produced, and I think the explanation that you [33] gave may have been that this was — you think this [34] might be because this was a 001 file at that time? Is [35] that possibly the explanation for that, the [36] book-keeping department didn't pick up the 001 [37] designation?

[38] A: I didn't ask for the 001 bills because I [39] had forgotten that it was first docketed as a 001.

[40] Q: Well, what about the rest of the response [41] to the subpoena? Do we have the 001 file materials in [42] this box?

[43] MR. LIPMAN: Objection. It assumes facts [44] not in evidence. Excuse me a minute.

[45] MR. WOLBRETTE: I have no idea what that [46] objection means.

Page 89

[47] Q: The subpoena was directed to you, Mr. Kuesters; is that correct?

[48] A: I will check the 001 file. I did not check [49] that.

[50] MR. LIPMAN: As counselor of Mr. Kuesters, [51] let me make it clear that this subpoena, while [52] directed to Mr. Kuesters, was on behalf of the firm. [53] Mr. Kuesters doesn't have any personal files. These [54] are firm files and firm documents, and based upon [55] that, Mr. Kuesters on behalf of the firm made a [56] reasonable effort to get reasonably responsive [57] documents.

[58] Q: Dr. Kuesters, do the documents which you [59] have produced contain the 001 file materials?

[60] MR. LIPMAN: Objection, foundation.

[61] A: I don't know.

[62] Q: Well, if they do not, then the subpoena [63] that — this response is not complete and it's clear [64] that in other respects the response is not complete, [65] so we've already gone through. Let me also —

[66] MR. LIPMAN: Well, I object to your [67] characterization, assuming that wasn't the

Page 90

[68] questioning, that was just your editorial comments, [69] and if you don't want to ask the witness, I'll [70] voir dire him that he made a reasonable effort on the [71] behalf of the firm to get responsive documents to the [72] subpoena, and if in fact he did not get all responsive [73] documents, we will make a reasonable effort to [74] supplement.

[75] MR. WOLBRETTE: I'm making no assertions [76] about Mr. Kuesters. I believe he probably did make a [77] reasonable effort. I'm just trying to find out what [78] has not been produced. We're obviously going to be [79] doing this another time, so we want to make sure that [80] we get all those documents before we start that one.

[81] We have reviewed this box and we do not [82] find the Newman declaration that is attached to P-58. [83] We do not find P-58 or any other revival petition [84] which was filed. We don't find any drafts of the [85] Newman declaration, we don't find any other [86] declarations filed with the PTO. We don't find [87] materials filed with PTO prior to your retention, [88] which are now public as part of the file. So we just [89] point this out to you to suggest some areas where

Page 91

[90] perhaps there might be something else that has not [91] been produced.

[92] Also, we have — the only correspondence [93] with David Newman that we find in here — and when [94] I say "we," I guess I'm using the — I guess I shouldn't [95] do that. While we've been sitting here, Ms. Manning [96] has been looking through this, so I'm just telling you [97] what she's telling me. The only letter she sees [98] dealing with David Newman, correspondence, is a letter [99] to Mr. Newman of April — I'm sorry — of

May the 9th, [100] '95. And so if there are any other letters to [101] Mr. Newman, we would appreciate you making them [102] available to us. Is it possible that there are other [103] file materials, 001 file materials that have not been [104] produced or any of these things —

[105] MR. LIPMAN: Wait. Are you finished with [106] your question?

[107] Q: Well, did you look for these things that [108] I've just gone through and not found them or is it [109] possible that there are some other things that you [110] didn't look for? And again, I'm not accusing you [111] of not doing anything. I'm just trying to find out

Page 92

[112] what's left to find.

[113] MR. LIPMAN: I object to the form of the [114] question, the very compound nature of the question. [115] I'll ask the question, Mr. Kuesters, sitting here [116] today, do you believe there's a likelihood there might [117] be other responsive documents that after another [118] reasonable effort you might find?

[119] THE WITNESS: I don't know.

[120] MR. LIPMAN: Are you going to make a [121] reasonable effort to find other documents if they [122] exist?

[123] THE WITNESS: Yes.

[124] MR. WOLBRETTE: And we would also request [125] that he be provided a log of any documents which are [126] withheld as privileged.

[127] MR. LIPMAN: That question I'm sure is [128] directed to —

[129] MR. WOLBRETTE: If they know. It's hard to [130] say who's asserting the privilege.

[131] MR. LIPMAN: Let's make one thing clear. [132] The privilege belongs to the client, and the client is [133] Axonn, Counsel. You know that. And I'm asking —

Page 93

[134] MR. WOLBRETTE: That's why I'm confused by [135] your constant objections.

[136] MR. REUTER: We said that —

[137] MR. WOLBRETTE: We said that late in the [138] game.

[139] MR. LIPMAN: Counsel, let me make it clear [140] here. I am here representing the witness and the law [141] firm.

[142] MR. WOLBRETTE: You made that clear.

[143] MR. LIPMAN: Let me finish — that's a [144] third party here. We are merely custodian of [145] documents and information that are owned and possessed [146] by the client. The privilege we're asserting is a [147] privilege on behalf of the owner of the information. [148] That

owner has its own counselor here present. I [16] think the record is crystal clear what's going on [17] here. You can ask questions that are not clearly [18] directed to producing or disclosing privileged or work [19] product information, you'll get what you need. That's [20] the problem.

[21] Q: Thank you. I'm going to show you a [22] document that we'll mark as D-3, declaration of Donald

Page 94

[1] L. Schilling, Ph. D. Would you read that please?

[2] A: Okay, I've read this.

[3] Q: Have you ever seen this before today?

[4] A: No.

[5] Q: Has anyone ever read from this document to [6] you to your knowledge at any time?

[7] A: No.

[8] Q: Has anyone ever discussed the substance of [9] this document with you prior to today?

[10] MR. LIPMAN: Objection, vague and [11] ambiguous.

[12] A: No.

[13] Q: If you had had this document in your [14] possession after this patent that we've been talking [15] about was revived but prior to when it was issued in [16] January of this year, would you have felt it necessary [17] to bring to the attention of the patent office the [18] references that are contained in this document?

[19] MR. LIPMAN: Objection, hypothetical, [20] speculative, seeks expert testimony from a lawyer as [21] to compliance with 37 CFR section 1.56, amongst [22] others. As a result, I instruct the witness not to.

Page 95

[1] answer the question.

[2] MR. WOLBRETT: Okay, I can keep going or, [3] fellows, it's ten after 11. If this is a good time [4] for you guys to stop, I'm happy to stop or I can keep [5] going.

[6] MR. LIPMAN: I think it's a good time for [7] us to stop. Clearly there's a likelihood that we'll [8] have to continue.

[9] MR. WOLBRETT: I think so.

[10] (A document was marked as Defendant's [11] Exhibit Number 3.)

[12] (Deposition concluded at 11:09 a.m.)

Page 96

UNITED STATES OF AMERICA)

vs.

COMMONWEALTH OF VIRGINIA)

I, ECKHARD KUESTERS, the witness herein, having read the foregoing testimony of the parties in this deposition, do hereby certify it to be a true and correct transcript, subject to the [65:13] corrections, if any, shown on the attached pages 2-3 11 12.

ECKHARD KUESTERS

Subscribed and sworn to before me

this _____ day of _____, 19__

Page 97

UNITED STATES OF AMERICA)

vs.

COMMONWEALTH OF VIRGINIA)

I, KAREN YOUNG, a Notary Public within and for the Commonwealth of Virginia, do hereby certify that the witness whose deposition is hereinbefore set forth was duly sworn and that the within transcript is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my

hand this _____ day of _____, 199__

My Commission Expires:

June 30, 1998

Page 98

[1] WITNESS: It is your right to read your deposition [2] and make any changes in form or substance. Note the [3] reason for any changes directly on the errata sheet.

[4] Please sign and date the errata sheet and your [5] deposition in the spaces provided. You are signing [6] this transcript subject to the changes you have made [7] on the errata sheet. Unless otherwise agreed to by [8] counsel to this deposition, you must sign before a [9] notary public.

[10] Return the original errata sheet and signature [11] page to the deposing attorney (attorney asking [12] questions) promptly! Court rules require completion [13] of this process within 30 days after receipt of the [14] transcript or signature is deemed waived.

[15] DEPOSING ATTORNEY: Upon receipt of the signed errata [16] sheet and signature page, please distribute copies to [17] all parties in attendance and place the original [18] signed pages in the original transcript.

[19] If you do not receive the signed errata sheet [20] and signature page within 30 days after receipt of the [21] original transcript, you may assume that signature has [22] been waived.

Page 99

ERRATA SHEET

PAGE LINE # CHANGE REASON THEREFOR
WITNESS DATE

Page 100

3-2-3 LAWYER'S NOTES
PAGE LINE 2-3

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001 36:11, 14; 37:4, 21;
38:3; 88:10, 12, 14, 15, 17;
89:3, 14; 91:14
002 23:4, 25:4, 26:18;
37:21; 63:22
004 23:3, 4; 26:4
007 26:19, 20

1

1 31:17, 18; 33:17; 38:3;
64:9
1.37A 84:17
1.56 94:21
10 87:1
10:29 72:8
10:38 72:9
11 9:2; 95:3
11:00 9:10; 86:5; 87:7
11:09 95:14
12 8:22
137A 84:7
15th 64:10
17 76:13
17th 81:18; 82:4
19 85:13
1968 6:7
1975 6:16
1977 6:15
1981 7:3
1993 81:18; 82:4
1994 76:13
1995 30:17, 31:22; 32:4;
33:7, 21; 35:13, 17, 21;
36:4; 39:2, 3; 40:2; 43:11,
20; 44:10, 12, 13; 54:17;
57:7; 60:14; 61:3, 12;
64:16; 66:13; 71:3; 72:11;
74:8, 22; 75:10; 78:9; 81:8,
10; 86:14; 88:7
1996 25:5
19th 58:2, 59:5; 82:20;
83:7; 85:6; 86:16
1st 81:2

2

2 33:11, 17, 21; 36:4; 37:3;
38:7; 46:22; 54:17
21st 73:5, 13; 74:10; 75:1
24th 72:19, 75:8
28 32:4; 33:7, 21; 35:17;
57:7; 72:11; 88:7
28th 35:10, 20; 36:4; 38:7;
44:12; 54:16; 60:14; 61:3;
12; 66:13; 73:3, 13; 74:10;
87:10

3

3 95:12
30 99:9; 98:13, 20
31 64:16
31360 64:17
3145 4:13
37 84:17; 87:1; 94:21

4

4/28/95 54:20
4/4 44:21
4/4/95 33:22; 34:9; 40:17;
41:12; 42:14
4th 30:17; 31:22; 36:18;
39:1, 3; 40:1, 72:19; 75:8

5

58 56:15; 80:14; 81:1;
82:16
59 82:15, 17

6

6926 23:3
6926-0001-002 34:3
6926-002-20 21:19;
24:21
6926-004-20 22:8, 10
6926-007-20 26:1, 15
6926.0002 64:16
6926/001/20SD 34:18;
35:22
6th 43:11, 20; 44:10, 13;
72:19, 73:5; 74:22; 75:8

9

9 82:13
95 91:11
97 26:13
9th 91:10

A

a.m. 72:8, 9; 95:14
abandoned 18:19; 19:1,
2, 5; 20:9; 21:15, 20;
23:1; 24:1, 17; 27:14;
29:3; 30:16; 34:21; 35:2, 4;
53:12; 56:18; 79:6; 82:6,
21; 83:8; 85:14
abandonment 58:10;
84:8, 16; 85:4
ability 16:14
able 10:1
absolutely 13:19; 48:9
accommodate 9:4; 86:9

accordance 5:15
according 54:16; 56:4;
83:13
accurate 12:16; 45:10,
12; 46:5; 47:1
accusing 33:6; 91:21
actual 78:14
actually 36:13
add 67:15
adding 68:8
addition 48:22
additional 24:4
advance 10:11
advantageous 79:4
advice 79:15, 16
advise 61:4; 73:22;
74:20; 75:9
advised 20:14; 21:4
affidavit 60:6; 66:12;
69:3; 79:8; 81:20
again 27:12; 71:9; 73:6;
76:9; 91:21
against 60:7; 62:8; 64:5;
66:7, 14; 74:8, 21
agree 67:9; 76:3; 87:22
agreeable 9:7, 11
agreed 9:15; 98:7
agrees 37:2
ahead 8:5; 25:1; 32:1, 21;
46:19; 66:9; 70:18; 71:20
a1:4; 19:6, 18
Alarm 34:18
alleging 60:7; 64:5
allow 85:13; 86:17
allowed 21:22; 62:11
although 16:13; 44:18
ambiguous 20:12, 14;
23:13; 24:10; 26:7; 34:5,
11; 36:7; 38:10; 47:9; 60:1;
62:4; 63:15; 84:22; 85:10;
94:11
amongst 94:21
answered 47:18; 66:9;
70:1; 71:8
anticipation 25:12
apologize 16:16
Apparently 32:11; 56:3
appearance 37:14
appears 7:9
application 19:12; 21:19;
26:3; 27:15; 30:17; 36:16,
17; 37:9; 39:5; 40:3, 19;
41:13; 42:16; 53:17; 85:14
applied 41:17
appreciate 33:5; 38:1;
86:11; 91:12
appropriate 30:13
April 26:13; 30:17; 31:22;
32:4; 33:1, 7; 21:35, 12;
17, 20; 36:4, 18; 38:7;
39:1, 3; 40:1; 43:10, 20;
44:10; 12, 13; 54:16; 57:7;
60:14; 61:3, 11; 66:13;
69:17; 71:3; 72:3, 11, 19;
73:3, 5, 5, 13, 13; 74:10,
10, 22, 22; 75:8, 8, 8; 78:9;
81:7, 10; 86:14; 88:7;
91:10
area 51:2
areas 12:5; 90:22
arguing 67:17, 18
argument 30:9; 84:18;
20, 85:1, 3, 16
argumentation 68:8
argumentative 67:16;
68:7; 70:17; 74:16; 75:4,
15; 85:19; 86:22
arguments 84:4, 7, 15
Arlington 4:20
articulating 68:22
aspersions 90:8
asserted 30:2
asserting 92:19, 22;
93:13
assign 36:12
associate 6:10
associated 18:11; 22:4
assume 43:3; 45:17;
60:17; 98:21
assuming 45:22
assumes 30:20; 58:6;
59:22; 60:15, 18; 74:11;
88:19
assuming 34:14; 47:18;
52:12; 87:15; 89:22
assure 87:7
attached 56:21; 80:18;
81:6; 90:15
attempt 17:3; 35:1, 11,
13; 51:12; 54:9; 78:10, 12
attendance 98:17
attention 94:17
attorney 4:15; 7:18;
98:11, 11, 15
attorney-client 39:11;
75:14
attorneys 7:20; 47:7;
49:19
August 6:16; 64:9, 16;
69:17
available 8:22; 8:9; 51:2;
91:13
avoid 46:10
aware 49:1; 71:2; 80:16;
81:17; 82:19; 83:6; 85:12,
15; 86:16
awkward 9:20
Axonn 7:19; 12:19, 22;
13:3, 4; 7:14; 20; 15:1, 18;
17:22; 19:9, 11, 13, 16, 19;
23:3; 27:13, 16; 28:12, 14;
31:2; 33:8; 35:5, 9, 14;
37:13; 38:19; 47:7; 48:4, 8;
49:13, 16, 18; 50:9; 51:16;
52:9; 53:4, 16; 56:17; 60:6;
61:5; 64:5; 66:7; 73:22;
74:21; 75:9; 78:16; 81:17;
82:3, 19; 83:5, 6; 85:12;
86:15; 92:22

73:3, 5, 5, 13, 13; 74:10,
10, 22, 22; 75:8, 8, 8; 78:9;
81:7, 10; 86:14; 88:7;
91:10
area 51:2
areas 12:5; 90:22
arguing 67:17, 18
argument 30:9; 84:18;
20, 85:1, 3, 16
argumentation 68:8
argumentative 67:16;
68:7; 70:17; 74:16; 75:4,
15; 85:19; 86:22
arguments 84:4, 7, 15
Arlington 4:20
articulating 68:22
aspersions 90:8
asserted 30:2
asserting 92:19, 22;
93:13
assign 36:12
associate 6:10
associated 18:11; 22:4
assume 43:3; 45:17;
60:17; 98:21
assuming 45:22
assumes 30:20; 58:6;
59:22; 60:15, 18; 74:11;
88:19
assuming 34:14; 47:18;
52:12; 87:15; 89:22
assure 87:7
attached 56:21; 80:18;
81:6; 90:15
attempt 17:3; 35:1, 11,
13; 51:12; 54:9; 78:10, 12
attendance 98:17
attention 94:17
attorney 4:15; 7:18;
98:11, 11, 15
attorney-client 39:11;
75:14
attorneys 7:20; 47:7;
49:19
August 6:16; 64:9, 16;
69:17
available 8:22; 8:9; 51:2;
91:13
avoid 46:10
aware 49:1; 71:2; 80:16;
81:17; 82:19; 83:6; 85:12,
15; 86:16
awkward 9:20
Axonn 7:19; 12:19, 22;
13:3, 4; 7:14; 20; 15:1, 18;
17:22; 19:9, 11, 13, 16, 19;
23:3; 27:13, 16; 28:12, 14;
31:2; 33:8; 35:5, 9, 14;
37:13; 38:19; 47:7; 48:4, 8;
49:13, 16, 18; 50:9; 51:16;
52:9; 53:4, 16; 56:17; 60:6;
61:5; 64:5; 66:7; 73:22;
74:21; 75:9; 78:16; 81:17;
82:3, 19; 83:5, 6; 85:12;
86:15; 92:22

Axon's 13:7; 16:21;
48:11; 49:19; 79:11; 82:18

B

B.S. 6:7
back 10:5, 8; 54:3; 73:3;
86:9; 88:2
background 5:6; 8:9
bail 45:4
Baltimore 6:14
bar 5:4
base 22:3
based 13:9; 26:8, 8; 39:7;
40:6; 43:13; 65:10, 67:20;
68:6, 10, 20; 69:21; 71:13;
79:18; 83:22; 84:7; 85:21;
87:15; 17; 89:9
basic 37:19
basically 15:11
basis 77:13
bears 81:7
beauty 28:17
become 37:13
becoming 36:16
began 6:13; 25:11; 26:10,
19, 29:2
begin 26:5
begins 36:18
behalf 29:9; 56:17; 65:17;
89:7, 10; 90:4; 93:14
behave 16:12
behavior 51:13
beliefs 67:21; 68:21
believes 42:10
belongs 92:21
besides 28:17; 35:12,
87:1
best 33:12, 70:10
better 16:14
beyond 65:22; 68:12
bill 17:21; 22:1, 24:16;
26:11; 30:19; 32:4; 73:3, 1,
7, 9, 10, 12, 21; 34:17;
35:13, 16, 21; 36:4, 18;
37:3; 38:7; 39:21; 40:17;
44:3, 5, 12, 20; 45:2, 46:2;
50:1; 54:17; 56:3; 64:16;
18; 72:3, 11, 15, 18; 73:1,
4, 7; 87:21; 88:7
billed 34:1
billing 18:18; 32:12; 34:9;
36:10, 18, 19
bills 13:21, 22; 17:9, 13,
17; 18:7, 15; 19:4, 5, 6, 15,
16, 21; 20:19; 19, 21:14;
18, 22:5, 7, 10; 24:16, 19,
22; 29:14; 31:1, 3, 12, 18,
18, 20; 32:2, 3, 8; 36:11;
37, 21; 38:4; 45:9, 12;
46:11, 15; 64:8; 87:8, 16;
88:3, 14
bill 13:13
black 14:21; 12:5; 15:1

June 20, 1997

CONFIDENTIAL

AXONN CORPORATION v.

DAVID NEWMAN & DAVID NEWMAN & ASSOC., P.C.

bookkeeping 18:15;
19:6; 33:88:12
both 48:14
box 12:5; 17:8; 88:18;
90:14
breached 47:15
break 17:11; 12; 37:1;
72:7
brief 5:6; 6:4
briefly 7:21
bring 94:17
brings 15:18; 49:11; 20;
50:18; 64:6
Britten 73:5; 76:14
broad 11:13
Brunswick 66

C

call 12:6; 27:20; 28:20;
46:10
called 6:18
calling 9:10; 80:12
calls 38:21; 39:10; 42:5;
47:10; 52:6; 54:22; 62:10;
17; 75:3; 85:17
came 27:18; 49:15; 57:14
can 10:1; 12:13; 13:13;
16:18; 17:16; 20:7; 21:5;
10; 11; 23:19; 25:1; 9; 10;
19; 20; 26:2; 11; 27:18;
90:22; 31:3; 30:12; 32:18;
33:13; 34:13; 36:10; 20;
48:6; 13; 15; 39:20; 41:1;
34:3; 5; 18; 46:8; 17; 49:6;
52:12; 16; 54:20; 58:7;
59:8; 71:1; 76:15; 84:11;
86:3; 5; 87:7; 93:17; 95:2;
96:3
candor 86:19
capacity 7:16; 15:1
care 43:14; 19; 47:15
careful 20:4; 45:18; 46:4
case 8:4; 17; 14:9; 17:17;
8:9; 12; 21:4; 22; 22:13;
13:4; 25:4; 8; 26:4; 18;
29:6; 30:14; 33:9; 36:11;
3; 14; 37:16; 42:11; 43:5;
47:5; 6; 22; 50:10; 17;
67:12; 43:22; 70:11;
7:16; 79:18
categories 11:14; 16
cause 37:6
caution 28:8
certain 45:19; 46:3; 4
certainly 29:19; 30:8;
3:6; 67:1; 68:7; 76:3
certainty 15:8
FR 84:17; 87:1; 94:21
change 37:6
changed 37:4
changes 98:2; 3; 6
characterization 88:1;
9:22
check 89:3; 3
check 89:3; 3
circumstances 58:8; 11;
87:5
claim 18:8; 30:10
claimed 20:18
claims 20:16
clarification 68:6
clarity 39:16; 50:21; 52:6
clearly 52:14
clear 43:15; 44:2; 7;
63:17; 69:16; 87:15; 16;
19; 39:6; 18; 92:20; 93:6;
9; 16
clearly 87:3; 93:17; 95:7
client 12:19; 14:14; 19;
20; 20:4; 29:9; 46:3; 62:18;
64:16; 69:18; 18; 75:18;
92:21; 21; 93:13
code 38:13; 87:2
College 6:7
coming 10:8; 18:8
comments 90:1
Commonwealth 4:4
communicate 8:13
communication 12:22;
15:17
communications 12:18;
20:4; 28:5; 21; 29:18;
62:10; 17; 75:3; 13; 14
compare 17:14
compelling 10:14
complaint 63:4
complete 15:15; 17:16;
89:18; 19
completion 98:12
complex 65:9; 22
compliance 94:21
compound 65:1; 9; 22;
69:8; 74:2; 82:22; 92:3
conceivable 10:2
concept 37:20; 40:10; 12
concepts 40:14
concern 70:4; 6
concerning 17:3; 51:5;
63:11; 65:19
concluded 95:14
conclusion 38:21; 53:19;
59:3; 7; 11; 13; 16; 17;
78:5
concurrently 46:16; 20
conduct 53:15
CONDUCTED 4:8
confidential 5:14; 11:3
confidentiality 5:11; 13
confirm 41:6
confirming 78:3
confused 8:11; 71:20;
93:1
confuses 40:14

charge 26:12; 31:21;
41:16
charged 19:7; 30:11
charges 17:18
check 89:3; 3
circumstances 58:8; 11;
87:5
claim 18:8; 30:10
claimed 20:18
claims 20:16
clarification 68:6
clarity 39:16; 50:21; 52:6
clearly 52:14
clear 43:15; 44:2; 7;
63:17; 69:16; 87:15; 16;
19; 39:6; 18; 92:20; 93:6;
9; 16
clearly 87:3; 93:17; 95:7
client 12:19; 14:14; 19;
20; 20:4; 29:9; 46:3; 62:18;
64:16; 69:18; 18; 75:18;
92:21; 21; 93:13
code 38:13; 87:2
College 6:7
coming 10:8; 18:8
comments 90:1
Commonwealth 4:4
communicate 8:13
communication 12:22;
15:17
communications 12:18;
20:4; 28:5; 21; 29:18;
62:10; 17; 75:3; 13; 14
compare 17:14
compelling 10:14
complaint 63:4
complete 15:15; 17:16;
89:18; 19
completion 98:12
complex 65:9; 22
compliance 94:21
compound 65:1; 9; 22;
69:8; 74:2; 82:22; 92:3
conceivable 10:2
concept 37:20; 40:10; 12
concepts 40:14
concern 70:4; 6
concerning 17:3; 51:5;
63:11; 65:19
concluded 95:14
conclusion 38:21; 53:19;
59:3; 7; 11; 13; 16; 17;
78:5
concurrently 46:16; 20
conduct 53:15
CONDUCTED 4:8
confidential 5:14; 11:3
confidentiality 5:11; 13
confirm 41:6
confirming 78:3
confused 8:11; 71:20;
93:1
confuses 40:14

connection 18:19;
26:15; 16; 27:14; 30:16;
31:21; 36:5; 43:11; 49:11;
19; 50:2; 51:16; 53:16;
55:14
conscious 67:21; 85:13;
15
consciously 86:16
consequence 74:4
considered 5:14
constant 93:2
consult 12:13
consulted 47:6; 57:8
CONT 22:8; 10; 24:21;
29:1; 15
contact 43:10; 19
contacted 28:12; 14;
29:1; 43:17
contain 56:21; 89:14
contained 24:16; 63:11;
77:2; 79:11; 94:18
contains 81:5
contest 28:18
continually 30:2
continuation 23:4; 6; 8;
3; 22; 25:11; 26:3; 19
continue 9:15; 95:8
convenience 9:9
conversation 16:11; 20;
44:9; 13; 45:7; 64:19; 22;
69:17
conversations 13:7;
14:1; 5; 8; 13; 15:16;
16:19; 20; 17:6; 44:15; 16;
58:5; 72:16; 17; 18; 73:7;
18; 21; 74:9; 75:9; 17
convoluted 69:8
copies 11:2; 33:14; 98:16
copy 11:1; 33:10; 11; 13;
21; 62:19; 21; 63:1; 64:15
Corporation 6:9
correctly 41:14; 45:18
correspondence 91:3; 9
counsel 12:3; 13:7; 19;
15:18; 16:21; 21:7; 22:21;
34:11; 35:9; 37:2; 13;
40:16; 43:2; 15; 44:11;
48:3; 4; 5; 7; 11; 49:5;
50:9; 51:16; 52:5; 9; 53:4;
60:22; 79:16; 80:13; 16;
67:16; 92:22; 93:6; 98:8
Counselor 29:13; 51:22;
53:2; 89:5; 93:15
count 44:18
couple 86:6
course 52:13; 83:10
court 16:12; 31:17; 33:9;
47:22; 60:8; 61:6; 64:5;
74:1; 9; 75:10; 98:12
courtesy 27:12
cover 56:13; 82:17
covered 11:21
crashing 58:20; 85:8
crisis 58:14; 50:5
notwithstanding 50:5

Crutcher 15:20; 22
crystal 93:16
current 5:11
custodian 93:11

D
D-2 72:12
D-3 74:22
D.C. 31:1
damages 70:11
date 3:16; 25:3; 4; 37:5;
17; 47:7; 57:4; 58:2; 60:19;
61:2; 91:7; 98:17
dated 81:10; 18; 82:4
date 3:16; 25:3; 14; 21;
Dave 49:3
David 35:8; 43:10; 17; 19;
44:10; 15; 17; 47:15;
51:12; 13; 53:15; 54:19;
55:5; 56:13; 57:17; 58:9;
59:19; 50:4; 63:10; 64:1;
10; 11; 59:11; 76:14;
78:13; 80:2; 9; 17; 81:6; 9;
91:4; 9
day 31:20; 45:14; 15;
64:22
days 9:9; 44:15; 45:18;
46:4; 98:13; 20
deadline 58:2; 59:4; 19;
85:5; 13; 86:16
deadlines 9:6
deal 44:21; 35:1
dealing 17:19; 88:6; 91:9
dealt 69:16
decided 86:17
decision 25:6; 47:3; 8;
29:15; 15; 39:4; 20:2; 18;
41:12; 42:15; 79:4; 82:5; 5;
85:14
declaration 54:5; 56:22;
57:4; 19; 21; 59:13; 60:13;
61:5; 63:11; 66:13; 69:4;
70:3; 71:4; 17; 73:13; 80:2;
17; 81:6; 9; 84:19; 95:1;
90:15; 18; 93:22
declarations 54:18;
80:5; 9; 90:19
deemed 98:14
Defendant 31:17; 18;
33:11; 21; 37:3; 38:7;
46:22; 94:9
Defendant's 33:16; 36:4;
95:11
degree 67:8; 68:8
department 32:12; 33:3;
36:10; 88:12
depend 33:3
deposing 98:11; 15
deposition 5:9; 7; 5; 9:16;
51:3; 85:21; 95:14; 98:1; 5;
8
depositions 7:10; 56:13
described 70:18
desires 9:20

description 12:16
design 6:10
designation 88:13
desire 9:20
detailing 29:14
determine 30:12
difference 83:16
different 23:15; 22;
34:12; 36:13; 14; 40:11;
44:6; 48:16
differently 80:1
difficult 16:12; 20:13
dirig 90:3
directed 89:1; 7; 92:17;
93:18
Directly 98:3
disagree 76:3
disclose 60:6
disclosed 29:22
disclosing 69:4; 93:18
disclosure 28:2; 20;
29:10; 39:10; 42:5; 47:10;
75:3; 13
discuss 42:14; 55:7
discussed 5:21; 44:21;
59:19; 66:12; 94:8
discussing 54:19; 78:12
Discussion 31:8; 64:10
discussions 16:5; 29:16;
50:22; 69:11
disgruntled 79:8; 81:20
distribute 98:16
DIV 21:19
Dixon 15:9
docket 22:1; 36:15;
58:20; 85:8
docketed 88:15
docketing 36:12
document 12:10; 21;
39:7; 40:21; 21; 41:3; 9; 10;
11; 11; 73:13; 14; 54:21;
57:6; 9; 58:3; 59:14; 72:20;
73:9; 14; 76:21; 77:2; 5; 9;
19; 21; 79:11; 82:19; 83:5;
84:11; 13; 22; 85:10;
86:19; 93:22; 94:5; 9; 13;
18; 95:11
documents 5:11; 12;
9:19; 10:19; 22; 11:5; 12:8;
9; 22:13; 16; 26:2; 8; 30:3;
33:16; 89:9; 12; 13; 90:4;
6; 13; 92:6; 10; 14; 93:12
Donald 93:22
done 9:16; 18:4; 19:13;
19; 24:17; 26:15; 27:15;
50:20; 79:17; 87:10
down 16:13; 45:13; 46:15
Dr 58:1; 89:13
draft 54:18
drafts 57:13; 13; 90:17
due 84:16
duly 4:11
during 51:11; 60:12; 13;
64:19; 73:20; 74:3; 78:9; Mike 3

13
duty 86:18, 18

E

earlier 34:9; 36:3, 19
earn 30:12
easier 10:3
ECKHARD 4:1, 11; 40:17
Eckstein 14:1; 15:4;
28:15; 29:1, 16; 39:1;
42:17; 44:21; 45:7; 62:6, 7,
20; 71:11; 72:19; 73:21;
75:7
editorial 90:1
education 5:7
effort 10:4; 17:19; 20:20;
22:6; 24:7; 26:16; 30:16;
31:22; 37:22; 54:5; 56:16;
19; 89:11; 90:3, 6, 10;
92:7, 10
efforts 19:8; 54:14
either 7:2; 12:4; 13:3;
14:14; 51:6, 11
Electric 6:8
electrical 6:7
else 15:6; 18:12; 37:5;
67:22; 86:3; 91:1
embarrassed 33:4
employed 6:1
employee 79:8; 81:20
engage 67:12; 68:3
engaged 27:19; 39:12
engineer 6:10, 11, 11
engineering 6:7, 11
enter 36:14; 37:14
entire 12:10
entitled 68:15, 18, 20
entries 38:14
entry 30:15; 45:14
equivalent 6:19
Erin 15:13; 76:14
errata 98:3, 4, 7, 10, 15,
19
established 34:15
et 4:19; 6:18
ethical 68:10
ethics 67:22
even 11:9
event 37:6; 70:11
events 45:19; 46:3, 22
Everybody 16:11, 17
everyone 33:14
evidence 30:21; 58:6;
59:22; 60:16; 74:12; 88:20
exact 37:12
exactly 18:17; 21:3;
26:10; 37:16; 42:12;
63:20; 64:7; 71:10
EXAMINATION 4:8
examined 4:5
excellent 71:19, 19
0:10; 65:13; 66:3, 22; section 2:8, 8, 9

Excuse 88:20
executed 57:4
exhibit 22:13; 31:15;
33:17; 36:4; 38:3; 46:22;
54:17; 56:6; 15; 64:9; 80:4;
81:1; 83:10; 95:12
exist 92:11
expenses 55:9, 14
experience 7:10; 9:19
experienced 52:20
expert 47:6; 65:9, 22;
68:9; 84:1; 85:19, 22;
86:22; 94:20
explain 32:18; 46:17;
55:4; 58:8
explained 7:21
explanation 88:8, 11
express 70:4
extent 18:2; 20:7; 28:2;
36:17; 38:20; 47:10;
53:19; 54:22; 60:2; 66:21;
67:6

F

face 62:10; 66:19; 79:15
fact 29:21; 33:12; 48:20;
60:17, 18, 61:14, 15;
69:10; 75:4; 85:12, 21;
90:5
facts 30:20; 34:14; 48:22;
58:6; 59:22; 60:15; 74:11;
85:2; 88:19
factual 65:10; 85:22
Fair 78:20
fairly 11:13
Fant 14:1; 15:4; 73:13,
22; 74:7
far 18:22; 31:3; 48:15
February 25:5; 58:2;
59:5; 76:13; 81:18; 82:4,
20; 83:7; 85:5, 12, 86:16
federal 9:7; 60:8; 61:6;
64:5; 74:1, 9; 75:10
fee 22:3; 49:10, 14
feel 65:16; 66:21, 22
feels 7:22
fees 18:9, 10, 11; 19:7;
20:17, 18; 22:4; 30:10, 12
feet 58:12
fellows 7:19; 95:3
felt 11:15; 12:10; 94:16
few 86:5; 87:12
field 37:12
file 22:7; 25:22; 26:5;
29:15, 17; 31:1; 34:1, 2, 9,
12; 35:17, 18, 19; 36:5;
37:4; 38:7, 12, 13; 39:5;
40:3, 19; 41:13; 42:15;
44:22; 59:19; 78:4, 8; 79:8,
11; 81:19; 88:10, 17; 89:3;
14; 90:21; 91:14, 14
filed 25:5; 54:8; 56:15, 17;
19; 60:7; 64:4; 70:12

71:11, 16; 74:8, 21; 78:11,
12; 82:20; 83:6; 86:19;
90:17, 19, 20
files 66:6; 77:22; 81:18;
82:3, 18; 83:5; 89:8, 9
filing 78:14
find 11:12, 14; 18:6, 14;
20:15, 19; 28:5; 32:16;
36:9, 20; 37:2; 48:22;
67:20; 68:15, 18, 20;
90:10, 15, 16, 17, 18, 19;
91:4, 22; 92:1, 7, 10
Fine 21:14; 52:12; 80:5
finish 51:8; 69:20; 93:10
finished 6:15; 10:12;
51:9; 70:1; 91:16
finishing 6:11
firm 4:7; 5:22; 6:17, 20,
21; 7:2; 15:19; 18:3; 48:6;
89:7, 9, 10; 90:4; 93:8
firms 15:21
first 4:2; 26:11; 27:15;
30:15; 31:20; 33:22; 37:3;
38:14, 19, 22; 39:6, 16;
49:8; 54:9, 10; 56:16, 20;
69:19; 78:10; 83:1; 88:15
Fisher 6:18
five-minute 72:7
Florence 4:13, 14
flow 5:20
follow 43:1, 8
follow-up 67:7
following 43:6
follows 4:6
foot 85:7
forget 73:3
forgotten 36:11; 88:15
form 18:1, 20; 12; 32:9;
39:6; 40:4, 7; 43:21; 45:21;
46:18; 47:9; 51:17; 57:1,
14, 19; 58:5; 22; 59:6, 21;
61:9; 63:14; 65:1; 67:5, 13;
69:7, 21; 70:16; 71:5; 77:3;
78:17, 22; 79:13; 83:2, 9;
84:10, 21; 92:2; 98:2
formalities 5:9
forth 55:14
found 64:13; 91:19
foundation 13:16; 18:2;
30:18; 32:20; 34:4, 11;
37:8; 43:22; 45:11; 47:2;
52:2, 10, 20; 53:18; 57:6,
11; 58:6, 13, 18, 21; 59:10,
21; 60:9; 68:11; 69:22;
71:6; 78:7; 89:15
foundational 60:22
Four 6:12
frame 60:12; 63:22; 78:13
Friday 79:9; 81:21
front 21:15; 22:14; 31:11;
32:2, 5; 38:2; 39:7; 44:20;
64:8, 15; 82:2, 13
further 26:3; 67:15, 23

G

game 93:5
gave 88:9
general 17:21; 20:2
generally 11:19; 14:6;
20:7, 15; 21:4; 37:17;
46:20; 85:11
gist 85:3
given 33:20; 83:22; 87:5
giving 68:2
goes 52:22; 65:22; 87:1
good 76:8; 85:14; 95:3, 6
graduated 6:5
graduation 6:16
guess 21:11; 30:14;
32:22; 44:4; 63:3; 91:5, 5
guy 28:18
guys 95:4

H

hand 22:18; 81:14; 85:17
handed 76:19
handling 47:16
happen 46:8
happened 28:6; 44:4, 6;
45:14, 15, 19; 51:6, 7
happens 8:2; 46:17
happy 95:4
hard 92:18
hear 27:7, 11, 12
heard 27:10; 48:10
help 8:11; 18:5, 7; 21:5,
10, 11; 22:20; 23:1, 2,
34:13, 15; 64:12; 86:7
hesitate 16:8
himself 5:22
hired 38:19
history 29:16, 17; 39:5;
40:3, 19; 41:13; 42:16;
44:22
Hold 27:6; 72:4
holding 85:16
home 49:7
hope 9:5; 55:20
hopeful 25:13
hypothetical 37:15;
65:8, 21; 85:18; 86:22;
94:19

I

idea 8:12; 88:21
immoral 65:4
imposed 9:6
improper 8:1; 33:7; 65:3
in-person 16:20
inadvertent 30:4
inadvertently 5:16; 30:4;
32:14; 18:7
37:11

include 15:3; 17:8
included 11:17; 13:1, 10;
19:16; 32:11, 14; 58:11
includes 81:9
inconvenience 10:6
incredible 16:13
independent 39:9;
43:13; 44:3, 14; 71:9
indicating 38:15; 40:17;
41:5; 72:15; 73:4; 76:11
indicated 83:5; 86:15
indicates 34:8, 44:22;
72:18
indicating 36:15; 82:19
information 20:6; 28:3,
11; 29:11; 39:11, 12; 42:6;
47:11; 19; 49:6; 50:5, 51:5,
55:5; 56:1, 65:5, 17, 20;
74:4, 13; 77:12, 14, 16;
78:15, 19; 79:10, 12, 19;
86:13; 93:12, 14, 19
informed 8:20; 71:22
initiated 64:11
inquire 30:11
instance 24:5; 49:4
instruct 29:11; 39:17;
47:12, 20; 50:5; 55:5; 56:1,
65:11; 66:2; 68:13; 74:4,
13; 77:13; 79:19; 84:2;
85:20; 87:6; 94:22
instructed 75:19
instructing 39:14; 42:7,
9, 20; 75:22
instruction 42:18; 43:7
instructions 43:2, 8
Intellectual 5:3
intended 27:1
intent 55:18
intentionally 32:15, 17
interested 12:16; 50:22
internal 36:12
interrupted 5:19
interview 27:21
into 6:12; 28:22; 30:8;
57:14, 17; 87:10
invoice 64:16
involve 21:19; 29:10;
55:22
involved 7:13; 23:10;
35:9
involving 14:8
issue 22:3
issued 94:15
item 23:3
items 12:2, 4; 51:14

J

JA 79:5
January 6:15; 94:16
Jersey 6:6
join 48:13, 18; 50:7; 52:1, 3
60:10; 65:43; 66:3; 22; section

11;80:2, 13, 18;81:1, 5,
 13;82:2, 83:1, 1;84:7, 15;
 86:2, 10, 12;90:13, 92:20
 only 7:15, 9:18, 11:1;
 18:2, 22;19:3, 22:13;31:1;
 35:4;80:13, 91:3, 8
 open 10:4, 13
 opened 38:8, 14
 opinion 47:14; 65:9, 22;
 68:9;84:1;85:19;86:22;
 87:3
 opinions 86:1
 opportunity 68:2
 opposed 17:20; 18:3;
 49:12, 20;54:13;75:17
 opt 76:7, 12
 optimistic 5:23
 option 10:3
 order 5:11, 13;29:5;
 47:22
 ordinary 16:11
 original 98:10; 17, 18, 21
 Orleans 9:22; 60:8; 61:6;
 74:1, 9;75:11
 others 14:2; 49:7; 94:22
 otherwise 10:16; 11:17;
 76:11; 98:7
 out 5:9; 11:12, 14, 21;
 12:5; 17:18; 18:6, 14; 19:6;
 20:5, 19; 21:5, 11, 12;
 22:21; 23:2; 28:5; 32:15,
 16, 17; 34:13; 35:17; 36:9,
 20; 37:2; 46:12; 48:22;
 64:12; 67:20; 68:15, 18,
 20; 73:2; 76:7, 12; 79:6;
 90:10, 22; 91:22
 outside 9:22; 16:21
 over 31:2; 43:14; 44:12;
 86:5
 own 93:15
 owned 93:12
 owner 93:14, 15

P

P-14 76:13, 83:11, 13
 P-58 56:12, 14; 80:11;
 82:13, 17; 83:4; 84:4;
 86:14, 90:15, 16
 P-59 56:12, 13; 81:1; 82:3
 P.C. 6:18
 p.m. 8:22
 page 38:16; 64:13; 98:11,
 16, 20
 pages 98:18
 paid 49:10, 16, 18
 paper 12:5
 paragraph 79:2, 2
 parenthesis 79:7
 part 23:6; 24:7; 54:5, 9,
 10; 87:1; 90:21
 particular 17:20; 45:14;
 53:17; 57:10
 parties 48:17; 98:17
 party 29:11; 49:7, 22

partner 6:19, 22; 7:2
 party 93:11
 pass 86:17
 past 87:10
 Patent 5:1, 4; 8:7; 17:20;
 18:19; 19:1, 2, 5; 20:8, 10;
 21:16; 17; 23:5, 11, 15, 16;
 24:1, 4, 4, 17; 26:21; 27:1,
 3, 9; 29:3; 30:17; 34:21;
 35:2, 4, 14; 36:15, 17;
 37:9, 12; 47:16; 49:12;
 53:12, 16; 54:8; 56:18;
 58:3; 59:20; 59:5, 9; 81:3;
 21; 82:6, 21; 83:7, 7; 84:5;
 85:4; 86:15, 18; 87:2;
 94:14, 17
 patents 20:11; 21:17;
 49:21
 pattern 23:10
 pause 73:19
 payment 22:3
 PC 4:19
 people 14:22; 28:17
 per 22:2
 perhaps 91:1
 Perilli 54:18
 person 50:15; 65:4, 19;
 76:6, 7
 personal 68:20; 89:8
 personally 18:2; 65:15,
 16
 petition 34:19; 39:4;
 40:2, 18; 41:12; 42:15;
 43:11; 56:16; 78:14; 80:1,
 13; 81:12, 17; 82:12;
 84:16; 90:16
 Ph.D. 94:1
 phone 9:16; 10:13; 52:6,
 21; 64:22
 phrased 47:12; 48:19;
 55:21; 83:14
 pick 88:12
 pieces 12:4
 Pierce 15:13
 Pigman 15:19
 place 9:22; 98:17
 plaintiff's 56:6,
 please 4:10; 8:9, 11; 20:1,
 3; 28:9; 50:21; 76:15; 94:1;
 98:4, 16
 point 20:2; 37:11, 14;
 57:21; 58:8; 90:22
 pointed 21:7
 portions 29:15; 39:4;
 40:3; 19; 41:13; 42:15
 position 10:15; 15:10
 positively 63:9
 possessed 93:12
 possession 86:13; 94:14
 possible 8:7, 10; 55:18;
 66:11, 18; 67:20; 70:9, 14;
 71:15; 79:16; 91:13, 20
 possibly 20:5; 88:11
 practice 4:17; 14:3;
 67:11

practices 67:21; 68:21
 precise 13:14
 predecessor 15:19
 preliminary 36:16
 preparation 25:11
 prepare 29:5
 preparing 63:22; 78:10;
 81:16; 82:2, 12, 17; 83:4
 present 93:15
 presume 87:9
 pretrial 47:22
 pretty 87:19
 previous 75:15; 82:14
 previously 13:20; 17:14;
 33:8; 56:12
 Primarily 20:8
 prior 22:5; 35:9; 56:12;
 60:13; 61:3; 64:22; 74:16;
 77:19; 78:14; 86:14;
 90:20; 94:9, 15
 privilege 11:16, 21; 30:2,
 6, 6; 62:16; 92:19, 21;
 93:13, 14
 privileged 12:10; 20:5;
 28:2, 10; 29:10, 19; 32:7;
 42:6; 47:11, 19; 50:4; 55:1,
 5, 22; 56:4; 62:10, 13, 17;
 74:3; 12; 75:3, 13, 14;
 77:12, 15; 79:18; 92:15;
 93:18
 probably 14:12; 17:12;
 26:13; 28:20; 47:21; 90:9
 problem 5:18; 9:10, 18;
 40:12; 58:12; 65:15, 16;
 79:7; 80:7; 14:81:19;
 93:20
 problems 58:16; 85:6
 process 34:13; 52:16;
 98:13
 processes 29:8; 39:12;
 42:7; 83:20, 21
 produce 11:19
 produceable 12:11
 produced 5:15; 10:19;
 11:6, 6, 17; 12:9; 17:14;
 20:16; 22:17; 30:4; 31:18;
 88:8; 89:14; 90:11; 91:2,
 15
 producing 31:12; 32:8;
 93:18
 product 20:5; 28:3, 10;
 29:11; 39:11; 42:6; 47:11,
 19; 50:4; 55:1, 22; 74:3;
 12; 77:12, 16; 79:19; 93:19
 production 12:4; 13:1,
 20; 30:5
 professional 87:2
 progress 34:16
 project 29:2
 promptly 98:12
 pronounce 4:18
 proper 30:12
 properly 55:21; 69:1
 property 5:3
 prosecution 20:8, 8, 9,

10; 21:16, 22; 22:2; 36:14;
 63:22
 provide 62:19
 provided 5:12, 12; 12:19;
 19:17, 20; 33:8; 51:4;
 79:10; 92:14; 98:5
 provision 5:13
 provisions 5:10
 PTO 81:4; 90:19, 20
 PTO's 29:15; 39:4; 40:2,
 18; 41:12; 42:15
 Public 4:3; 90:21; 98:9
 purposes 81:11
 put 32:18; 45:13; 46:15

Q

question's 83:12, 14
 questioner 69:20
 quickly 86:4
 quite 8:7, 10

R

raised 28:11
 raising 44:2
 rather 87:10
 re 34:19; 76:14
 read 7:4; 39:8; 41:7, 14;
 54:3; 76:15; 19; 77:1, 4;
 94:1, 2, 5; 98:1
 reading 41:7; 83:10
 really 43:7; 86:8
 reason 8:1; 10:14; 11:16;
 12:11; 86:17; 98:3
 reasonable 30:13; 89:11;
 90:3, 6, 10; 92:7, 10
 reasonably 89:11
 reasons 32:15; 66:1;
 84:2
 recall 14:10; 15:14; 17:7;
 25:3; 26:10; 37:16; 38:22;
 44:12, 16; 57:15, 16;
 61:13; 63:20, 20; 64:7;
 65:2
 receipt 98:13, 15, 20
 receive 98:19
 received 29:13; 81:2
 Recessed 72:8
 recollection 13:12; 36:2;
 38:18; 39:9; 40:1, 6, 10;
 44:3, 5, 14; 67:19; 68:16;
 71:10, 13; 74:18
 reconsider 29:21
 reconsideration 56:14
 Reconvened 72:9
 record 5:21; 14:4; 15:15;
 16:19; 17:5; 23:19; 31:5, 8;
 34:8; 35:16; 36:17; 44:10;
 46:16; 63:17; 66:5; 69:10,
 15; 93:16
 recordings 14:13
 recorded 35:19; 46:3, 22
 reconfirmed 46:3, 22

records 16:4
 redacted 11:6, 10
 redaction 12:6
 redactions 31:3
 refer 37:21; 39:21; 40:7
 reference 21:18; 34:17,
 18
 referenced 26:1; 35:20
 references 13:22; 67:14;
 94:18
 referring 22:12, 15, 16,
 29:24; 41:9; 59:7, 12;
 79:1, 3
 refers 23:3; 26:2
 reflect 44:1; 64:9
 reflected 36:3
 reflects 73:8
 refresh 39:22; 44:5
 refreshing 40:10
 refusal 55:15
 refused 52:6
 regarding 74:18; 75:16
 relate 20:19; 21:2, 15, 16;
 79:15
 related 30:13
 relating 87:1, 8
 relation 63:21
 relative 47:19; 79:17
 relied 85:1
 remaining 88:4
 remember 22:21; 44:9
 removed 11:5, 32:7
 renew 84:15
 repeat 22:9; 54:1
 reporter 16:13; 31:17;
 33:10
 represent 48:16
 representation 47:1
 representing 5:22; 7:18,
 19; 93:7
 request 11:13, 13; 56:14;
 92:13
 requested 11:20
 requests 66:20
 require 98:12
 requires 78:5
 reread 84:11
 reserve 10:7
 reserving 10:16
 reside 4:12
 respect 15:1
 respects 89:19
 response 10:19; 31:19;
 70:6; 88:7, 16; 89:18, 19
 responsibility 87:2
 responsible 37:10
 responsive 89:11; 90:4,
 5; 92:6
 rest 88:16
 restate 83:3
 resubmit 39:4
 result 29:11; 84:1; 94:22

resume 6:4
retention 9:20
return 8:19; 87:12; 98:10
REUTER 93:3
reveal 20:3; 23:10; 29:8;
47:18; 50:4; 77:11, 15;
83:20
revelation 55:1, 22
review 29:14; 50:19;
41:12; 44:21; 46:11; 84:13
reviewed 29:18; 40:2, 18;
99:14
reviewing 5:17
revised 5:17
revival 17:3, 19; 19:20;
20:20; 21:5, 21, 21; 22:2;
6:24; 7:25; 4:26; 16;
27:14; 30:16; 31:21;
37:22; 54:9, 10, 13, 56; 16;
78:10, 12; 90:16
revive 29:3; 34:19; 35:1;
12, 13; 43:11; 51:12; 54:5;
80:1; 81:13, 17; 84:16
revived 19:12; 20:10;
21:20; 24:18; 25:4, 9, 13,
15; 26:18; 57:13; 70:11;
84:5; 94:15
right 4:18; 7:4; 8:12; 10:7;
11:22; 19:4; 20:6; 23:21;
25:1; 26:14; 29:1; 30:11;
31:12; 34:19; 35:9; 37:20;
45:13, 15; 46:2, 14; 49:7;
53:11; 54:16; 58:12; 59:1;
57:2, 13; 81:14; 98:1
rights 10:16
Road 4:13, 14
Robert 15:20
role 47:5; 49:1; 51:6
rule 67:22
rules 68:11; 98:12
run 49:7
running 73:2
Rutgers 5:6

S

same 16:15; 23:10, 15;
17; 28:7; 8:37; 22; 42:18;
48:56; 7:9; 62:16; 68:13;
74:15; 75:2, 12
Sanderford 14:2; 15:3;
75:5, 21; 74:20
Sanderford's 15:11
saying 55:17
Schilling 94:1
school 5:7; 6:13, 14, 15
scope 66:1; 68:12
se 22:3
second 27:6; 31:6; 83:1;
46:10
secretary 15:12
section 94:21
seek 65:17
seeking 59:24; 65:6;
17:34; 10:46; 38:9

19; 68:9
seeks 28:2; 53:19; 65:9;
22; 69:9; 71:18; 74:3, 12;
75:12; 79:18; 84:1; 85:19;
86:22; 87:3; 94:20
seem 80:6
seems 78:4
sees 91:8
segregated 19:8
segregating 17:18, 19
Seidman 7:15
send 50:1
senior 6:11
sent 11:13; 19:6, 15
sentences 79:15
served 8:16
services 50:2
set 8:21; 17:16; 18:16;
81:12; 87:5
seven 6:9
several 80:5, 9; 84:4
sheet 98:3, 4, 7, 10, 16,
19
sheets 46:16
short 36:15
showhand 81:11
shout 53:12; 56:4, 11;
57:22; 73:12; 76:12; 93:21
shown 55:12
sign 7:4; 98:4, 8
signature 98:10, 14, 16,
20, 21
signed 57:10; 60:19, 21;
70:3; 81:6; 98:15, 18, 19
signing 60:13; 98:5
simply 67:11, 12; 68:2, 3;
78:3
sitting 14:11; 36:2; 39:20;
40:1, 5; 63:8; 67:19; 91:6;
92:4
situation 83:22
SN 49:3
SN07/782,845 40:20;
41:13; 42:16
somebody 7:22; 77:4
someone 65:17
sometime 9:8; 61:22
sometimes 9:19; 32:13;
38:14
sorry 22:9; 52:3; 59:16;
63:10; 64:4; 72:6; 77:17;
82:16; 91:10
sort 51:14
sounds 76:8
spaces 98:5
speak 16:15; 52:13, 21
speaking 14:19
speaks 40:22; 54:22;
57:6; 59:15; 72:21; 73:10;
15; 84:22; 85:10
specialty 4:22
specifically 30:14; 39:1,
2

specification 20:18
speculate 15:9
speculation 26:22;
66:20; 67:8; 69:9; 71:18;
83:13
speculative 25:17;
70:17; 85:19; 86:21; 94:20
speed 31:13; 52:16
Spivak 1:18, 19; 6:17;
48:6
spoke 14:22; 15:6, 13;
17:2; 52:15; 73:12; 74:22;
73:7
spoken 49:5; 52:8, 18;
38:1, 5; 73:4
stack 20:16; 22:12, 15;
26:1; 32:8; 38:2; 73:1
staff 58:16; 85:7
stamp 81:4
stamped 81:1
stand 30:6
standard 47:15
stands 49:8
start 5:8; 90:13
started 22:17
starting 6:10
state 4:10; 6:5; 44:4
statement 12:3; 79:3
states 82:4
stating 81:19; 82:8
step 49:5
Sieve 9:17; 73:13
still 5:17; 51:18
stipulation 76:6
Stone 15:19
stop 9:10; 95:4, 4, 7
straight 69:11; 70:20
strictly 41:9
Strike 74:2; 78:11
structure 6:20; 18:16
subject 5:10, 13; 65:6;
87:17; 98:6
submit 85:15, 16
submitting 86:14
subpoena 8:16, 20;
10:18, 20; 31:19; 49:15;
69:1; 68:12; 85:21; 86:10;
87:12; 88:7, 17; 89:1, 6;
99:5
subpoenaed 48:20;
65:10
subpoenas 89:17
substance 14:4; 20:4;
28:10, 21; 51:5; 72:17;
73:6, 18; 75:17; 77:8, 19;
78:15; 94:8; 98:2
substantiate 85:2
substantive 21:22
sued 61:5, 8, 10, 16, 17,
22; 64:20; 65:6, 7, 18;
69:5, 5; 70:4, 7, 14, 15;
73:22; 75:9
suggest 90:22

suit 15:18; 64:4, 21;
69:13; 70:12; 71:11, 14, 16
suite 79:5
summer 10:1
supplement 90:7
supplying 58:3
support 7:15; 84:19
supposed 60:20
Sure 10:9; 11:9; 12:14,
15; 17:11, 15; 13:10, 13;
40:5; 45:18; 46:4, 8; 47:21;
48:2, 14; 51:18; 55:18;
59:11; 67:14; 84:14;
90:1, 2; 92:16
suspense 7:26; 3:19
switch-over 37:17
sworn 4:2
System 34:18; 58:20
systems 38:12, 12

T

Talk 50:15; 64:1; 80:14;
87:13
talked 9:14; 38:22; 51:3;
57:9; 63:9, 10; 69:3; 71:3,
17
talking 18:10, 20; 28:16;
31:14; 35:20; 37:5; 54:12;
57:16; 60:4, 5; 61:4; 65:4;
70:2; 78:19; 80:2, 3, 11,
22; 81:11, 13; 94:14
technical 8:8
telephone 10:5; 13:6;
14:13; 16:19; 59:15; 52:9,
13; 53:4; 64:10
telling 71:14; 91:7, 8
tells 25:19; 76:10
ten 95:3
term 57:12
terms 30:10; 36:14
testified 4:5
testimony 14:12; 65:10;
75:16; 85:22; 94:20
thereafter 6:8
therefore 14:16
third 25:22; 44:4; 67:16;
93:11
thought 39:12; 42:6;
70:10; 83:21
thoughts 29:9
three 44:6; 71:19
times 32:14; 50:20
51:15, 19; 52:1, 8, 22;
53:2, 3; 60:5
time 6:21, 22
today 8:22; 22:18; 31:12;
32:8; 36:21; 39:20; 40:1, 6;
49:12, 20; 50:18; 63:8;
64:6; 77:19; 80:4; 82:5;
92:5; 94:3, 9
told 8:3, 5; 9:1; 16:10;
33:1; 51:13; 58:9; 69:12;
70:9, 10, 13, 19, 19

total 12:8
trademark 87:3
transcript 98:6, 14, 18,
21
tried 11:19
true 17:4; 29:4; 69:14;
85:11
try 9:17; 17:18; 37:7;
40:16; 45:9, 12; 46:8, 10;
69:1; 70:10; 80:22
trying 11:12, 14; 18:6, 14;
20:15, 19; 21:5; 22:20;
23:2; 28:5; 32:16; 44:15;
37:19; 48:22; 57:20; 86:8;
90:10; 91:22
turn 43:14
turned 22:22; 31:2; 44:11
two 15:21; 40:11, 14;
71:19; 79:9, 15

U

ultimately 29:2
unavoidability 84:8
unavoidable 84:8, 16;
85:4
unclear 60:11
unconfuse 40:16
under 5:11; 21:18; 22:1;
35:22; 84:17; 87:5
unethical 65:4
unfriendly 55:10
unintentionally 79:6
university 6:6, 13
unless 10:13; 25:19;
48:14; 76:7, 11, 12; 77:14,
14; 80:1; 98:7
unredacted 29:13
up 6:15; 8:21; 9:21; 18:16;
21:20; 34:13; 52:16; 80:3;
88:12
upon 25:8, 8; 39:7; 43:13;
65:6, 11; 68:6, 10; 79:18;
83:22; 85:21; 97:15, 17;
89:9; 98:15
USDSN 5:8; 9:14; 10:7, 10;
11:1; 12:13; 15:15, 21;
21:9; 24:11, 19; 26:17;
28:19; 30:1, 22; 40:4, 11;
44:1; 45:21; 48:13, 18;
50:7; 54:10, 12; 56:7; 58:5;
59:6; 60:10; 61:1; 62:9, 13,
16; 65:13, 66:3, 17, 19;
67:13; 69:7; 71:7; 74:6, 15;
75:2, 12, 21; 76:8; 82:7;
83:12; 87:22
use 56:8; 88:4
used 84:18
using 91:5

V

vague 23:12; 24:9; 26:6;
17:34; 10:36; 38:9

47:8; 59:22; 62:3; 63:14;
84:21; 85:9; 94:10
various 11:13; 57:22;
60:5; 85:6
version 57:10
view 42:14; 51:12; 68:9;
74:16; 75:4, 15
violate 86:18
violates 47:21
Virginia 4:5, 20
voice 68:5
voiced 55:6
voir 90:2

W

wait 52:11; 61:20; 91:16
waiting 79:3
waived 29:20; 98:14, 22
waiver 30:1, 3, 6
wants 43:18
Washington 9:21; 51:1
waste 87:11
way 5:9; 12:21; 13:16;
14:3; 19:6; 38:6; 52:22;
55:11; 63:13; 66:22;
68:12, 12; 69:1; 76:2;
83:13; 88:5
weather 51:1
week 64:22; 69:12, 15
weren't 69:22; 70:21
Westinghouse 6:8, 9,
12, 17
what's 11:5, 6; 18:11;
35:20; 38:16; 56:11;
76:13; 77:1, 17; 92:1;
93:16
who's 7:18; 92:19
whole 12:8
whose 59:11
willing 86:7
Wireless 34:18
wish 39:22
withheld 92:15
withhold 14:17
within 4:4; 9:8; 11:15;
19:16; 98:13, 20
without 65:6; 69:4
witness 5:22; 7:7; 10:6;
11:9; 12:18; 22:14; 23:1;
25:3; 28:8; 12:29; 12:34:6;
35:22; 39:13; 42:7; 47:12;
20; 48:19; 20; 50:5, 13;
55:2; 56:1; 60:20; 61:1;
63:6; 65:9, 11; 66:2; 67:17;
18, 21; 68:10, 13; 70:1;
71:9; 74:5, 13, 18, 19;
75:5, 16; 77:7, 13; 78:8;
79:19; 80:19; 83:10; 84:2;
85:20; 22:87:4, 6; 90:2;
92:8, 12; 93:7; 94:22; 98:1
WOLBRETTE 4:9; 5:18;
6:2; 7:8; 10:9, 15, 17; 11:4,
11; 12:15, 20; 13:18; 16:9;

20:13; 21:1, 13; 22:15;
23:14; 24:21; 25:1, 5, 27:8;
28:4, 13; 30:7; 31:1, 10;
33:19; 34:3, 7; 35:19;
39:14, 19; 40:9, 15; 41:1,
4; 42:9, 13, 20; 43:16;
44:8; 45:3; 46:1; 48:2, 7,
10, 16, 21; 49:9, 17; 50:8,
14; 51:10, 21; 52:17; 53:1,
21; 54:11, 15; 55:4, 8, 13,
19; 56:8, 10; 60:17; 62:11;
63:1, 5, 7; 68:15; 71:12;
72:6, 10; 75:19; 76:5; 77:6,
78:3; 79:21; 80:16, 20;
82:9; 86:8; 87:19; 88:2, 21;
90:8; 92:13, 18; 93:1, 4, 9,
95:2, 9

Woodbine 4:13, 14
words 17:17; 27:20;
28:17
work 6:8; 17:20; 19:8, 10,
13, 16, 19; 20:5; 24:3, 15,
25:15; 26:5, 10, 14; 27:13,
16, 19, 19; 28:2, 10; 29:6,
11; 35:11; 36:3; 39:11;
42:6; 47:11, 19; 49:12, 12,
21; 50:4; 55:1, 22; 74:3,
12; 77:12, 15, 79:19; 93:18
worked 6:9; 19:3, 5, 35:5
working 29:2
works 7:21
worst 9:22
wrapper 29:17
writing 14:4
written 14:12; 16:4, 18;
17:5; 45:6
wrong 33:6; 80:19, 21

Y

year 94:16
years 6:9, 12
Young 4:3

Z

zero 52:18

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